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The Eighth Amendment's Lost Jurors: Death Qualification and Evolving Standards of Decency

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The Eighth Amendment's Lost Jurors: Death Qualification and Evolving Standards of Decency

ALIZA PLENER COVER*

The Supreme Court's inquiry into the constitutionality of the death penalty has overlooked a critical "objective indicator" of society's "evolving standards of decency": the rate at which citizens are excluded from capital jury service under Witherspoon v. Illinois due to their conscientious objections to the death penalty. While the Supreme Court considers the prevalence of death verdicts as a gauge of the nation's moral climate, it has ignored how the process of death qualification shapes those verdicts. This blind spot biases the Court's estimation of community norms and distorts its Eighth Amendment analysis.

This Article presents a quantitative study of Witherspoon strikes in real capital cases, measuring the strike rate in eleven Louisiana trials resulting in death verdicts from 2009 to 2013. Of the 1445 potential jurors questioned, 325 individuals (22.5%) were excluded from service on the basis of their opposition to the death penalty. These exclusions had a considerable impact on the racial composition of the jury pool: in the trials for which individualized information on race was available, one-third of black venire members were struck under Witherspoon, and nearly sixty percent of those struck on this basis were black. These findings underscore the profound impact of death qualification upon the composition of capital juries and the outcomes of capital trials. Particularly in the wake of Justice Breyer's recent call for reconsideration of the death penalty's constitutionality, there is an urgent need for (a) systematized, ongoing data collection on Witherspoon strikes, and (b) formal consideration of the effect of death qualification in future Eighth Amendment analysis.

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INTRODUCTION

On May 15, 2015, a federal jury in Massachusetts returned a death verdict in the case of convicted Boston Marathon bomber Dzhokhar Tsarnaev.¹ It was an outcome that could only have occurred in federal court: under state law, capital punishment had been abolished for thirty years, and Massachusetts saw its last execution in 1947.² After Tsarnaev's conviction and partway through the penalty phase of his trial, a *Boston Globe* poll found that less than twenty percent of Massachusetts residents and only fifteen percent of Bostonians believed that he should be executed³—notwithstanding the bloody devastation and citywide paralysis he inflicted.⁴ The same poll found that less than a third of Massachusetts residents and only a quarter of Boston residents supported the death penalty under any circumstances for heinous crimes.⁵ Yet twelve jurors, all residents of Massachusetts, unanimously voted for

1. Katharine Q. Seelye, *Dzhokhar Tsarnaev Given Death Penalty in Boston Marathon Bombing*, N.Y. TIMES (May 15, 2015), http://www.nytimes.com/2015/05/16/us/dzhokhar-tsarnaev-death-sentence.html?_r=0 [https://perma.cc/4AM4-X24U].

2. *Massachusetts*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/massachusetts-0> [https://perma.cc/R5KJ-H3A2].

3. Evan Allen, *Few Favor Death for Dzhokhar Tsarnaev, Poll Finds*, BOS. GLOBE (Apr. 26, 2015), <http://www.bostonglobe.com/metro/2015/04/26/globe-poll-shows-diminishing-support-for-death-penalty-for-tsarnaev/S3GMhFIGj5VUkZrmLzh1iN/story.html> [https://web.archive.org/web/20160722120516/http://www.bostonglobe.com/metro/2015/04/26/globe-poll-shows-diminishing-support-for-death-penalty-for-tsarnaev/S3GMhFIGj5VUkZrmLzh1iN/story.html].

4. A WBUR poll conducted just after Tsarnaev's conviction and before the penalty phase found that only 26% of Boston residents, and 31% in the larger Boston area, supported the death penalty for Tsarnaev. Asma Khalid, *Death Penalty for Tsarnaev Increasingly Unpopular, WBUR Poll Finds*, WBUR NEWS (Apr. 16, 2015), <http://www.wbur.org/2015/04/16/tsarnaev-death-penalty-poll-wbur> [https://perma.cc/GP4J-DJV5]. A similar poll in the midst of the trial found that 27% of Boston registered voters sampled were in favor of his execution. Zeninor Enwemeka, *WBUR Poll: Most in Boston Think Tsarnaev Should Get Life in Prison over Death Penalty*, WBUR NEWS (Mar. 23, 2015), <http://www.wbur.org/2015/03/23/wbur-poll-tsarnaev-death-penalty-life-in-prison> [https://perma.cc/3YNX-KKD6]. A poll conducted by the *Boston Globe* in September of 2013 found that 33% of Bostonians were in favor of the death penalty for Tsarnaev. Brian MacQuarrie, *In Globe Poll, Most Favor Life Term for Dzhokhar Tsarnaev*, BOS. GLOBE (Sept. 16, 2013), <http://www.bostonglobe.com/metro/2013/09/15/most-boston-residents-favor-life-without-parole-for-tsarnaev-convicted-poll-shows/Ur6ivWIUiYCpEZLXBpHDL/story.html> [https://web.archive.org/web/20160729171601/http://www.bostonglobe.com/metro/2013/09/15/most-boston-residents-favor-life-without-parole-for-tsarnaev-convicted-poll-shows/Ur6ivWIUiYCpEZLXBpHDL/story.html].

5. Allen, *supra* note 3; *see also id.* (follow "a Boston Globe poll shows" hyperlink)

death in Tsarnaev's case.⁶ The disparity between the outcome of Tsarnaev's trial and the strong community opposition to capital punishment suggests that the verdict was impacted by death qualification—the process whereby citizens are questioned about their views on the death penalty and excluded from jury service if they express conscientious objections that may impede their willingness to impose the penalty of death.⁷ Because Tsarnaev's federal capital case was tried, extraordinarily, in an abolitionist state, the impact of death qualification was particularly noteworthy; yet death qualification shapes verdicts in death-penalty states nationwide—and there has been no systematic accounting for the extent of its impact.

Death qualification is one of the most striking and distinctive procedural features of the modern American system of capital punishment. A rich scholarship has critically examined the impact of this practice on the fairness of individual capital trials under the Sixth Amendment, particularly in terms of producing uncommonly conviction- and death-prone juries.⁸ This Article makes a new contribution by focusing on a different issue: the impact of death qualification upon the broader judicial inquiry into whether capital punishment is “cruel and unusual” under the Eighth Amendment.

In assessing the constitutionality of the death penalty, the Supreme Court considers aggregate capital trial outcomes as “objective indicia” of our nation's “evolving standards of decency.”⁹ Tsarnaev's death verdict, therefore, would be judicial evidence of societal approval of the morality and constitutionality of the death penalty—notwithstanding vocal and pervasive community disagreement with the practice, and despite the fact that the prosecution was able to obtain that outcome only after death qualifying the jury. I argue that, since it looks to capital jury verdicts in its Eighth Amendment analysis, the Court must *also* consider statistics about the rate of juror disqualification under *Witherspoon*¹⁰ and its progeny. The process of death qualification produces jury verdicts that diverge from community estimations of the cruelty of the death penalty; from a statistical standpoint, the data set of capital

(displaying full results of poll), <http://www.bostonglobe.com/rw/Boston/2011-2020/WebGraphics/Metro/BostonGlobe.com/2015/04/28poll/28poll-results.pdf> [https://perma.cc/H4FJ-MK4W].

6. Katharine Q. Seelye, *Jurors Chosen for Dzhokhar Tsarnaev's Trial in Boston Marathon Bombings*, N.Y. TIMES (March 3, 2015), <http://www.nytimes.com/2015/03/04/us/boston-marathon-bombing-trial.html> [https://web.archive.org/web/20151023141431/http://www.nytimes.com/2015/03/04/us/boston-marathon-bombing-trial.html]; Milton J. Valencia, *Dzhokhar Tsarnaev Gets Death Penalty for Placing Marathon Bomb*, BOS. GLOBE (May 15, 2015), <https://www.bostonglobe.com/metro/2015/05/15/dzhokhar-tsarnaev-death-penalty-sentencing-jury-boston-marathon-bombing/canMEfLmeQJxQ4rFU0sERJ/story.html> [https://web.archive.org/web/20160421122241/http://www.bostonglobe.com/metro/2015/05/15/dzhokhar-tsarnaev-death-penalty-sentencing-jury-boston-marathon-bombing/canMEfLmeQJxQ4rFU0sERJ/story.html].

7. Precise numbers of death-qualified jurors in Tsarnaev's case are not yet available, as the transcripts of jury voir dire have been sealed. See Nancy Gertner, *Death Qualified: The Tsarnaev Jury, His Sentence and The Questions that Remain*, WBUR: COGNOSCENTI (May 28, 2015), <http://cognoscenti.wbur.org/2015/05/28/death-penalty-nancy-gertner> [https://perma.cc/JHX5-NKN2].

8. See *infra* note 42 and accompanying text.

9. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)); see *infra* notes 50–52.

10. *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

jury verdicts is a biased sample. Disqualified jurors are excluded not only from capital jury service in each individual case but also from the constitutional conversation about whether the death penalty violates the Eighth Amendment. Explicitly incorporating *Witherspoon* strike rates into the constitutional analysis would recover a less biased, more representative data set and would account for the voices of citizens who are otherwise silenced through death qualification.¹¹

My purpose in this Article is to recalibrate the relevance of jury verdicts to the Eighth Amendment analysis by incorporating the rate of juror disqualification as an objective indicator critical to a meaningful inquiry into the constitutionality of the death penalty. This is an important yet narrow—and therefore attainable—goal. Discerning society’s “evolving standards of decency” is a fraught endeavor, particularly for a counter-majoritarian institution such as the Supreme Court.¹² I do not attempt here to grapple with the countermajoritarian difficulty¹³ nor to wholly reimagine the Court’s role in interpreting the scope of the Eighth Amendment in an evolving society. I do not argue here, as others have done, for an overhaul of the Court’s “objective indicia” analysis to incorporate public opinion polls, or international law, or professional organizations’ expertise.¹⁴ I respond, instead, to the Court’s existing approach and the parameters that it has already established—focusing on “objective indicia” of “evolving standards of decency,” composed primarily of (1) legislative action and (2) jury determinations.¹⁵ If jury determinations are to be used as evidence of society’s views on the death penalty, then the Court must also account for the legal process by which those juries were selected and those jury determinations obtained: specifically, for the practice of death qualification.¹⁶

11. Of course, *Witherspoon* strike rates—which capture the rate of opposition to the death penalty only in those jurisdictions that support capital punishment enough to bring capital cases to trial—are not by themselves accurate gauges of national views on the death penalty and cannot be substitutes for the existing indicators. One would not expect Louisiana *Witherspoon* strike rates, for example, to match the rate of death penalty opposition nationwide, or in non-death-penalty states such as Massachusetts.

12. Justice Scalia has been a prominent critic of the malleability of the inquiry. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 611 (2005) (Scalia, J., dissenting) (“The attempt by the Court to turn its remarkable minority consensus into a faux majority . . . is an act of nomological desperation.”); *Atkins v. Virginia*, 536 U.S. 304, 341–48 (2002) (Scalia, J., dissenting).

13. See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16–23 (1962).

14. See, e.g., David Niven, Jeremy Zilber & Kenneth W. Miller, *A “Feeble Effort To Fabricate National Consensus”: The Supreme Court’s Measurement of Current Social Attitudes Regarding the Death Penalty*, 33 N. KY. L. REV. 83, 88–89 (2006).

15. I do not argue in this paper that death qualification, along with other voir dire practices including hardship excusals, peremptory challenges, and inequities in the venire selection processes, so fatally flaws jury verdicts as accurate measures of community standards that they should not be considered as objective indicia at all. This argument, however, has some appeal. I leave it for another day.

16. There are other defects in the objective indicia that the Court uses—for example, the legislative trends do not account for low participation levels by members of minority or low-income groups. But these are sprawling problems that are harder to control for. The bias that death qualification places on the objective indicia is a *judicially created* one, there is a clean and reasonably accurate way of measuring the extent of that bias, and that bias could be at least partially remedied by the judiciary as well.

This recalibration is particularly important today. Most recent constitutional litigation before the Supreme Court concerning capital punishment has focused on the outer boundaries of the practice, rather than its core. The Supreme Court has not reconsidered the constitutionality of the death penalty in its entirety since *Gregg v. Georgia*.¹⁷ Instead, recent Supreme Court cases involving challenges to the constitutionality of the death penalty have centered on issues such as the execution of intellectually disabled defendants¹⁸ and juveniles,¹⁹ the proportionality of the death penalty for the crime of child rape,²⁰ and the constitutionality of the method of execution.²¹ Jury verdicts have played a less central²² role in these decisions than, for example, in *Furman*²³ and *Gregg*.

In 2015, however, in a historic dissent, Justice Breyer, joined by Justice Ginsburg, called upon the Court to reconsider the constitutionality of the death penalty and expressed his own belief that “the death penalty, in and of itself, now likely constitutes a legally prohibited ‘cruel and unusual punishmen[t].’”²⁴ In light of this pronouncement—made by two justices in a case in which the constitutionality of the death penalty was not squarely before the Court—the fundamental validity of the practice of capital punishment remains a vital question without a stable answer.²⁵

The prevalence of death qualification should—if properly accounted for—play a critical role in how the Court ultimately resolves the issue. Dissenting in *Glossip*, Justice Breyer asserted that the administration of the death penalty is now “unusual,” as “most places within the United States have abandoned its use.”²⁶ Justice Breyer identified the steady decline in jurors’ imposition of sentences of death as an important indicator of the nation’s evolving standards of decency,²⁷ and also emphasized that these sentences were concentrated geographically within a small minority

17. 428 U.S. 153 (1976).

18. *Hall v. Florida*, 134 S. Ct. 1986 (2014); *Atkins v. Virginia*, 536 U.S. 304 (2002).

19. *Roper v. Simmons*, 543 U.S. 551 (2005).

20. *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

21. *Glossip v. Gross*, 135 S. Ct. 2726 (2015); *Baze v. Rees*, 553 U.S. 35 (2008).

22. Though less central, jury verdicts have remained pertinent. *See Atkins*, 536 U.S. at 324 n.* (Rehnquist, C.J., dissenting) (“[I]t is worth noting that experts have estimated that as many as 10 percent of death row inmates are mentally retarded, a number which suggests that sentencing juries are not as reluctant to impose the death penalty on defendants like petitioner as was the case in *Coker v. Georgia* and *Enmund v. Florida*.” (citations omitted)).

23. *Furman v. Georgia*, 408 U.S. 238 (1972).

24. *Glossip*, 135 S. Ct. at 2756 (Breyer, J., dissenting) (alteration in original) (quoting U.S. CONST. amend. VIII).

25. Recently, Justices Breyer and Ginsburg again called for reconsideration of the constitutionality of the death penalty. *Tucker v. Louisiana*, No. 15-946, slip op. at 1 (U.S. May 31, 2016) (Breyer, J., dissenting), *denying cert. to* 181 So. 3d 590 (La. 2015). It is possible that, when a new justice is confirmed to fill the empty seat of Justice Scalia, who was a vigorous opponent of judicial abolition of the death penalty, the Court will decide to answer that call.

26. *Glossip*, 135 S. Ct. at 2756 (Breyer, J., dissenting).

27. *Id.* at 2772–73 (Breyer, J., dissenting) (“An appropriate starting point concerns the trajectory of the number of annual death sentences nationwide, from the 1970’s to present day. In 1977—just after the Supreme Court made clear that, by modifying their legislation, States could reinstate the death penalty—137 people were sentenced to death. Many States having

of the nation's counties.²⁸ These facts are especially noteworthy when paired with the missing data point that I focus on here: these few death sentences in these few jurisdictions were attained *only with the critical assistance of death qualification*. What would these dwindling statistics look like if the conscientious objectors had not been stripped from the sentencing juries?

Because the "evolving standards of decency" inquiry is by its own terms *evolving*, the constitutionality of the death penalty is not fixed. As societal mores change, so too should the Court's jurisprudence. Jury verdicts retain significance today as one of the twin pillars of the "evolving standards of decency" analysis. Considering death disqualification rates *alongside* capital jury verdicts would provide critical information to the Court about the nation's values and the continued constitutionality of the death penalty.

In Part I of this Article, I summarize the Supreme Court's jurisprudence on death qualification; explain how the practice of death qualification impacts the analysis of the constitutionality of capital punishment under the Eighth Amendment; and argue that the Court must consider the prevalence of *Witherspoon* strikes alongside the outcomes of jury trials as "objective indicia" of "evolving standards of decency."

In Part II, I begin the empirical task of quantifying how death qualification proceedings shape the composition of capital juries by presenting the results of a study on the prevalence of *Witherspoon* strikes in Louisiana—a deep-South state, far from liberal Massachusetts. The purpose of this study is not to precisely delineate how frequently *Witherspoon* strikes are occurring nationwide. The aim, instead, is to provide an initial set of data to corroborate that *Witherspoon* strikes *are currently happening with substantial frequency*—to establish that death qualification proceedings have a constitutionally cognizable impact on the composition of capital juries and, thus, the outcome of capital trials nationwide. And, indeed, this study reveals that, over a five-year period in Louisiana, just over twenty-two percent of the 1445 potential jurors in eleven capital cases resulting in a death verdict were struck for cause on the basis of their opposition to the death penalty. These *Witherspoon* strikes, moreover, had a disproportionate racial impact. For seven of the trials, I was able to access individualized information about the race of each venire member. In these trials, nearly sixty percent of the prospective jurors who were struck under *Witherspoon* were African American, and more than one-third of all the African Americans in the jury venire were struck for cause on the basis of their opposition to the death penalty.

revised their death penalty laws to meet *Furman*'s requirements, the number of death sentences then increased. Between 1986 and 1999, 286 persons on average were sentenced to death each year. But, approximately 15 years ago, the numbers began to decline, and they have declined rapidly ever since. In 1999, 279 persons were sentenced to death. Last year, just 73 persons were sentenced to death." (citations omitted)).

28. *Id.* at 2761 (Breyer, J., dissenting) ("Geography also plays an important role in determining who is sentenced to death. And that is not simply because some States permit the death penalty while others do not. Rather *within* a death penalty State, the imposition of the death penalty heavily depends on the county in which a defendant is tried. Between 2004 and 2009, for example, just 29 counties (fewer than 1% of counties in the country) accounted for approximately half of all death sentences imposed nationwide. And in 2012, just 59 counties (fewer than 2% of counties in the country) accounted for *all* death sentences imposed nationwide." (emphasis in original) (citations omitted)).

In Part III, I propose ways to facilitate the inclusion of *Witherspoon* strikes into the Eighth Amendment analysis. I explore how the Court should incorporate this information into its analysis of “evolving standards of decency,” and I suggest a method of improving access to *Witherspoon* data by mandating and streamlining its collection on an ongoing basis.

In Part IV, I step back to discuss how explicit attention to death qualification would advance the broader participatory function of the Eighth Amendment, which invites (and, indeed, requires) a back-and-forth between Court and citizenry about the boundaries of permissible punishment. I identify features of death-qualification proceedings that encourage constitutional dialogue and others that suppress it, and I emphasize the need to maximize its dialogic features in light of the participatory ethos of the Eighth Amendment.

I. BACKGROUND: HOW *WITHERSPOON* SKEWS “OBJECTIVE INDICIA” OF “EVOLVING STANDARDS OF DECENCY”

Witherspoon v. Illinois and its progeny have approved the practice of death qualification: the systematic exclusion of conscientious objectors to the death penalty (also known as “*Witherspoon* excludables”)²⁹ from capital juries. Although some argue that the current Supreme Court law on death qualification has been erroneously interpreted to exclude too many death-averse prospective jurors,³⁰ the practical result of the Supreme Court’s death-qualification jurisprudence has been to enable some prosecutors to strike for cause virtually any juror with serious reservations about his or her ability to impose the death penalty.

Interestingly, the Supreme Court first approved the practice of death qualification in a case that *narrowed* rather than expanded the state’s ability at voir dire to strike jurors opposed to capital punishment. In *Witherspoon v. Illinois*, the Court prohibited the practice of excluding venire members from capital juries “simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.”³¹ The dissenters and some contemporary scholars predicted that this ruling sounded the death knell for capital punishment.³² Yet it has done nothing of the kind. *Witherspoon* explicitly reserved the state’s authority to strike for cause potential jurors

who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or

29. See, e.g., *Lockhart v. McCree*, 476 U.S. 162, 167 & n.1 (1986).

30. William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law’s Failure To Purge Arbitrariness from Capital Sentencing*, 39 CRIM. L. BULL. 51, 61 (2003); Susan D. Rozelle, *The Utility of Witt: Understanding the Language of Death Qualification*, 54 BAYLOR L. REV. 677, 688–89, 699 (2002).

31. 391 U.S. 510, 522 (1968).

32. *Id.* at 532 (Black, J., dissenting) (“If this Court is to hold capital punishment unconstitutional, I think it should do so forthrightly, not by making it impossible for States to get juries that will enforce the death penalty.”); Eric Schnapper, *Taking Witherspoon Seriously: The Search for Death-Qualified Jurors*, 62 TEX. L. REV. 977, 980 (1984).

(2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*.³³

Witherspoon thus left room for a modified practice of death qualification to continue. And seventeen years later, in *Wainwright v. Witt*,³⁴ the Court clarified that the appropriate standard for exclusion was broader than the language of *Witherspoon* might lead one to believe. After *Witt*, courts assessing challenges for cause during death-qualification proceedings need only ask "whether the juror's views [on the death penalty] would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'"³⁵ Significantly, *Witt* also dispensed with *Witherspoon*'s requirements that the potential juror's inability to follow the law be "unmistakably clear" or that the vote for life be "automatic."³⁶ In more recent cases, most notably in *Uttecht v. Brown*,³⁷ the Court has failed to apply even *Witt*'s articulation stringently.³⁸ The end result is a relatively lax standard for excluding jurors who have reservations about the death penalty, in the name of obtaining an "impartial" jury that would be willing to consider imposing the ultimate punishment sanctioned by law.³⁹

33. *Witherspoon*, 391 U.S. at 522 n.21 (emphasis in original).

34. 469 U.S. 412 (1985).

35. *Id.* at 424 (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)).

36. *Id.* ("We note that, in addition to dispensing with *Witherspoon*'s reference to 'automatic' decisionmaking, this standard likewise does not require that a juror's bias be proved with 'unmistakable clarity.'").

37. 551 U.S. 1 (2007).

38. *Uttecht* stressed that appellate courts reviewing *Witherspoon* exclusions are to afford discretion to the trial court's determinations. *Id.* at 7–10. In that case, the Supreme Court upheld the exclusion of a juror who harbored reservations about the death penalty, explaining that his "assurances that he would consider imposing the death penalty and would follow the law do not overcome the reasonable inference from his other statements that in fact he would be substantially impaired in this case." *Id.* at 18. The Court's holding spurred a strong rebuke from Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer:

Even a juror who is generally opposed to the death penalty cannot permissibly be excused for cause so long as he can still follow the law as properly instructed. The Court recognizes this principle, and yet the perverse result of its opinion is that a juror who is clearly willing to impose the death penalty, but considers the severity of that decision carefully enough to recognize that there are certain circumstances under which it is not appropriate . . . , is "substantially impaired." It is difficult to imagine, under such a standard, a juror who would not be considered so impaired, unless he delivered only perfectly unequivocal answers during the unfamiliar and often confusing legal process of *voir dire* and was willing to state without hesitation that he would be able to vote for a death sentence under any imaginable circumstance.

Today, the Court has fundamentally redefined—or maybe just misunderstood—the meaning of "substantially impaired," and, in doing so, has gotten it horribly backwards.

Id. at 43 (Stevens, J., dissenting) (citations omitted).

39. *Id.* at 44 (Stevens, J., dissenting) ("The Court emphasizes that 'the State has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes.' But that does not and cannot mean that jurors must be willing to impose a

Importantly, in practice, death qualification is but one avenue for the prosecution to prevent conscientious objectors from serving on capital juries. Through the exercise of peremptory strikes, the state is able to exclude even more death-averse jurors than permitted under *Witt*. The process of death qualification identifies those jurors who have qualms about the death penalty, and, even when these qualms do not justify a for-cause challenge, prosecutors can use their peremptory strikes to exclude those jurors from service. The combination of *Witherspoon* and peremptory strikes leads to capital juries that may be stripped of all opponents of capital punishment.⁴⁰

The impact of death qualification upon individual capital defendants' trials—both at guilt and sentencing—is well documented and profound. Dissenting in *Glossip v. Gross*, Justice Breyer recently pointed to death qualification as a possible root cause of an increased likelihood of wrongful convictions in death penalty cases.⁴¹ Death-qualified jurors are, on the whole, uncommonly conviction- and death-prone, as well as disproportionately punitive and inclined toward believing the prosecution.⁴² The process of death qualification itself predisposes jurors to assume the defendant's guilt.⁴³ And, because minorities, and African Americans in particular, tend to be more opposed to the death penalty than whites, researchers have predicted that death qualification likely strips juries of a disproportionate number of minority jurors.⁴⁴ As

death sentence in every situation in which a defendant is eligible for that sanction. That is exactly the outcome we aimed to protect against in developing the standard that, contrary to the Court's apparent temporary lapse, still governs today." (citation omitted)).

40. Bruce J. Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 MICH. L. REV. 1, 28–29 (1982) (concluding, in an early study of the use of peremptory challenges against death-averse jurors, that “the prosecution used peremptory challenges against . . . 77% of the scrupled jurors” and that “whereas 13% of the community opposed the death penalty, and 6% opposed it in a manner not justifying removal for cause under *Witherspoon*, fewer than 3% of the actual jurors and alternates opposed the death penalty”).

41. *Glossip v. Gross*, 135 S. Ct. 2726, 2758 (2015) (Breyer, J., dissenting) (“Other factors may also play a role. One is the practice of death-qualification; no one can serve on a capital jury who is not willing to impose the death penalty.”).

42. BENJAMIN FLEURY-STEINER, JUROR'S STORIES OF DEATH: HOW AMERICA'S DEATH PENALTY INVESTS IN INEQUALITY 24–25 (2004); Mike Allen, Edward Mabry & Drue-Marie McKelton, *Impact of Juror Attitudes About the Death Penalty on Juror Evaluations of Guilt and Punishment: A Meta-Analysis*, 22 LAW & HUM. BEHAV. 715, 724–25 (1998); Bowers & Foglia, *supra* note 30, at 84–86; Brooke M. Butler & Gary Moran, *The Role of Death Qualification in Venirepersons' Evaluations of Aggravating and Mitigating Circumstances in Capital Trials*, 26 LAW & HUM. BEHAV. 175, 183 (2002); Ronald C. Dillehay & Marla R. Sandys, *Life Under Wainwright v. Witt: Juror Dispositions and Death Qualification*, 20 LAW & HUM. BEHAV. 147, 159–61 (1996); Niven, et al., *supra* note 14, at 107–08; Susan D. Rozelle, *The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation*, 38 ARIZ. ST. L.J. 769, 784–85 (2006); William C. Thompson, Claudia L. Cowan, Phoebe C. Ellsworth & Joan C. Harrington, *Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes into Verdicts*, 8 LAW & HUM. BEHAV. 95, 97 (1984).

43. E.g., Craig Haney, *Examining Death Qualification: Further Analysis of the Process Effect*, 8 LAW & HUM. BEHAV. 133, 134 (1984); Niven et al., *supra* note 14, at 108.

44. See, e.g., Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 LAW & HUM. BEHAV. 31, 46 (1984) (finding that more African Americans and women are likely struck from capital juries than whites and

I will discuss later in the Article, my findings provide empirical confirmation of this phenomenon.

It bears mention that the Supreme Court has insisted upon a measure of reciprocity in the exclusion of jurors on account of their views on the death penalty. Jurors are subjected to “life qualification” as well as death qualification; in other words, jurors who are unable to meaningfully consider imposing a life sentence rather than the death penalty may also be struck for cause.⁴⁵ However, the practice of life qualification does not overcome the impact of *Witherspoon* and *Witt*. First, because of the unanimity requirement for a death verdict in most capital jurisdictions,⁴⁶ a single seated capital juror who fundamentally opposes the death penalty can have a decisive role in the verdict reached. The same is not true of automatic-death jurors. Thus, seating a single *Morgan*-excludable juror may make a death verdict more likely, but that verdict will still require the agreement of eleven other individuals. The practice of death qualification, rather than life qualification, thus has a more direct impact on the verdict reached. Second, judges often apply inconsistent standards to challenges of automatic-life and automatic-death jurors, more readily dismissing potential jurors for cause based on their opposition to the death penalty.⁴⁷ And, while some—but few—genuinely “death-disqualified” (or automatic-life) jurors ultimately serve on capital juries, there is strong empirical evidence that a large number of “life-disqualified” (or automatic-death) jurors make it into the jury box.⁴⁸ There is

men); Mark Peffley & Jon Hurwitz, *Persuasion and Resistance: Race and the Death Penalty in America*, 51 AM. J. POL. SCI. 996, 1006 (2007) (finding that African Americans are both more opposed to the death penalty and more receptive to arguments against it); J. Thomas Sullivan, *The Demographic Dilemma in Death Qualification of Capital Jurors*, 49 WAKE FOREST L. REV. 1107, 1134–47 (2014) (explaining how disparate racial attitudes on the death penalty may combine with death qualification proceedings to rid juries of minority jurors); Joseph Carroll, *Gallup Poll: Who Supports the Death Penalty?*, DEATH PENALTY INFO. CTR (Nov. 16, 2004), <http://www.deathpenaltyinfo.org/gallup-poll-who-supports-death-penalty> [<https://perma.cc/ML3L-NK3G>] (finding that “71% of whites support the death penalty, compared with only 44% of blacks”).

45. *Morgan v. Illinois*, 504 U.S. 719, 729 (1992) (“A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror. Therefore, based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views. If even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence.”).

46. Alabama, which also permits a judicial override of the jury’s advisory verdict, is one noteworthy exception to the ordinary rule for unanimity. ALA. CODE § 13A-5-46(f) (LexisNexis 2015) (“The decision of the jury to recommend a sentence of death must be based on a vote of at least 10 jurors.”).

47. John Holdridge, *Selecting Capital Jurors Uncommonly Willing to Condemn a Man to Die: Lower Courts’ Contradictory Readings of Wainwright v. Witt and Morgan v. Illinois*, 19 MISS. C. L. REV. 283, 290–91 (1999).

48. John H. Blume, Sheri Lynn Johnson & A. Brian Threlkeld, *Probing “Life Qualification” Through Expanded Voir Dire*, 29 HOFSTRA L. REV. 1209, 1212 & n.8 (2001) (noting that “[i]n contrast to the small number of ‘death unqualified’ jurors who actually serve

widespread agreement that the cumulative impact of *Witherspoon* proceedings—even as moderated by *Morgan*—is to yield juries more death prone than the communities from which their members were drawn.⁴⁹

While numerous scholars have explored these consequences of death qualification from the perspective of individual defendants' rights, this Article considers, instead, the trickle-down effect that death qualification has upon the evolution of Eighth Amendment jurisprudence on the constitutionality of capital punishment *as a whole* in our country. The Supreme Court has justified the practice of death qualification, and set limits upon it, by invoking the respective interests of the state and the defendant in obtaining an impartial jury *in an individual trial*.⁵⁰ Yet capital jury verdicts have a larger impact on the evolution of death-penalty law beyond their well-established effect upon the fate of individual defendants, and the Court has never accounted for the practice of death qualification in this broader, aggregate use of capital-jury verdicts.

The centerpiece of the Supreme Court's inquiry into the constitutionality of the death penalty under the Eighth Amendment is its analysis of society's "evolving standards of decency."⁵¹ To determine whether a particular punishment practice comports with these "evolving standards," the Court looks to "objective factors to the maximum possible extent"⁵² and has specifically approved two reference points—"the legislation enacted by the country's legislatures" and "data concerning the

in capital cases, far larger numbers of jurors who are not 'life qualified' serve in capital cases" and citing sources (emphasis in original)); Bowers & Foglia, *supra* note 30, at 62–63 (concluding, based on interview data and prior research, that "[q]uite clearly, the jury selection process eliminated nearly all persons who thought the death penalty was unacceptable as punishment for these crimes and failed to remove a great many who believed death was the only acceptable punishment for these offenses").

49. See, e.g., Blume et al., *supra* note 48, at 1212; Bowers & Foglia, *supra* note 30, at 60–66, 84–85; Jeffrey L. Kirchmeier, *Our Existential Death Penalty: Judges, Jurors, and Terror Management*, 32 LAW & PSYCHOL. REV. 55, 77 (2008); James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2097 & n.164 (2000); Rozelle, *supra* note 42, at 784–89; Rozelle, *supra* note 30, at 690–96.

50. E.g., *Adams v. Texas*, 448 U.S. 38, 45 (1980) ("The State may insist . . . that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court."). Notably, neither *Witherspoon* nor *Witt* accepted the theory that the Sixth Amendment fair-cross-section guarantee prohibited the exclusion of a segment of the community with scruples against the death penalty. In *Lockhart v. McCree*, the Court explicitly ruled that the fair-cross-section guarantee did not apply to the petit jury and also disagreed that the practice of death qualification violated that guarantee in any event. 476 U.S. 162, 176–77 (1986) ("In sum, '*Witherspoon*-excludables,' or for that matter any other group defined solely in terms of shared attitudes that render members of the group unable to serve as jurors in a particular case, may be excluded from jury service without contravening any of the basic objectives of the fair-cross-section requirement. It is for this reason that we conclude that '*Witherspoon*-excludables' do not constitute a 'distinctive group' for fair-cross-section purposes, and hold that 'death qualification' does not violate the fair-cross-section requirement." (citation omitted)).

51. *Atkins v. Virginia*, 536 U.S. 304, 311–12 (2002) (quoting *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958)).

52. *Id.* at 312 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1000 (1991)).

actions of sentencing juries”—as the primary objective indicia.⁵³ The Court has on occasion—and, in recent years, increasingly—considered other evidence, including international and foreign law,⁵⁴ viewpoints of professional organizations,⁵⁵ and public-opinion polls,⁵⁶ but these sources remain controversial⁵⁷ and have not been explicitly endorsed as reliable indicators of “evolving standards of decency” nor relied upon to resolve cases under the Eighth Amendment. “Objective indicia” alone are not the sole determinants of the Court’s Eighth Amendment jurisprudence: “[I]n cases involving a [national] consensus, [the Court’s] own judgment is ‘brought to bear’ by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators.”⁵⁸ However, the “objective indicia” analysis remains central to the Court’s inquiry.

The use of capital-jury verdicts as one of the two primary “objective indicia” of “evolving standards of decency” rests on the notion that juries serve as a link between punishments and the conscience of the community.⁵⁹ Although the twelve-member

53. *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989), *abrogated on other grounds by Atkins*, 536 U.S. 304.

54. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 575–78 (2005). For an interesting discussion of how international norms have entered the Eighth Amendment inquiry in America through more indirect routes, see James Gibson & Corinna Barrett Lain, *Death Penalty Drugs and the International Moral Marketplace*, 103 GEO. L.J. 1215 (2015).

55. *See Hall v. Florida*, 134 S. Ct. 1986, 1993–97 (2014).

56. “In recent years, the Supreme Court has even shown willingness to consult controversial alternative sources—such as the policy preferences of foreign countries and international bodies, as well as private professional associations—in order to determine what current standards of decency require.” John F. Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1751–52 (2008) (citing *Roper*, 543 U.S. at 575–78, and *Atkins*, 536 U.S. at 316 n.21). *But see Penry*, 492 U.S. at 335 (“The public sentiment expressed in these and other polls and resolutions may ultimately find expression in legislation, which is an objective indicator of contemporary values upon which we can rely.”).

57. *See, e.g., Atkins*, 536 U.S. at 324 (Rehnquist, C.J., dissenting) (“In my view, these two sources—the work product of legislatures and sentencing jury determinations—ought to be the sole indicators by which courts ascertain the contemporary American conceptions of decency for purposes of the Eighth Amendment. They are the only objective indicia of contemporary values firmly supported by our precedents. More importantly, however, they can be reconciled with the undeniable precepts that the democratic branches of government and individual sentencing juries are, by design, better suited than courts to evaluating and giving effect to the complex societal and moral considerations that inform the selection of publicly acceptable criminal punishments.”).

58. *Id.* at 312–13 (citation omitted) (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion)).

59. *Gregg v. Georgia*, 428 U.S. 153, 181–82 (1976) (plurality opinion) (“The jury also is a significant and reliable objective index of contemporary values because it is so directly involved. The Court has said that ‘one of the most important functions any jury can perform in making . . . a selection [between life imprisonment and death for a defendant convicted in a capital case] is to maintain a link between contemporary community values and the penal system.’ It may be true that evolving standards have influenced juries in recent decades to be more discriminating in imposing the sentence of death. But the relative infrequency of jury verdicts imposing the death sentence does not indicate rejection of capital punishment *per se*.”).

jury represents a tiny fraction of the population of any given jurisdiction, and although statistical representativeness on the petit jury is not required,⁶⁰ the unanimity⁶¹ of jury verdicts provides at least some assurance that those verdicts can be said to substantially represent the community estimation of fairness.⁶²

Rather, the reluctance of juries in many cases to impose the sentence may well reflect the humane feeling that this most irrevocable of sanctions should be reserved for a small number of extreme cases. Indeed, the actions of juries in many States since *Furman* are fully compatible with the legislative judgments, reflected in the new statutes, as to the continued utility and necessity of capital punishment in appropriate cases. At the close of 1974 at least 254 persons had been sentenced to death since *Furman*, and by the end of March 1976, more than 460 persons were subject to death sentences.” (alteration and omission in original) (footnotes and citations omitted) (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968)); *accord Roper*, 543 U.S. at 616 (Scalia, J., dissenting) (“[W]e have, in our determination of society’s moral standards, consulted the practices of sentencing juries: Juries “maintain a link between contemporary community values and the penal system” that this Court cannot claim for itself.” (quoting *Gregg*, 428 U.S. at 181)); *Atkins*, 536 U.S. at 323 (Rehnquist, C.J., dissenting) (“Our opinions have also recognized that data concerning the actions of sentencing juries, though entitled to less weight than legislative judgments, “is a significant and reliable objective index of contemporary values” because of the jury’s intimate involvement in the case and its function of “maintain[ing] a link between contemporary community values and the penal system””. In *Coker*, for example, we credited data showing that “at least 9 out of 10” juries in Georgia did not impose the death sentence for rape convictions. And in *Enmund v. Florida*, where evidence of the current legislative judgment was not as “compelling” as that in *Coker* (but more so than that here), we were persuaded by “overwhelming [evidence] that American juries . . . repudiated imposition of the death penalty” for a defendant who neither took life nor attempted or intended to take life.” (citations omitted) (first quoting *Coker*, 433 U.S. at 596; then quoting *Gregg*, 428 U.S. at 181; then quoting *Coker*, 433 U.S. at 596–97; and then quoting *Enmund v. Florida*, 458 U.S. 782, 793–94 (1982))).

60. *Batson v. Kentucky*, 476 U.S. 79, 85 n.6 (1986) (“[T]hough the Sixth Amendment guarantees that the petit jury will be selected from a pool of names representing a cross section of the community, we have never held that the Sixth Amendment requires that ‘petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population.’ Indeed, it would be impossible to apply a concept of proportional representation to the petit jury in view of the heterogeneous nature of our society. Such impossibility is illustrated by the Court’s holding that a jury of six persons is not unconstitutional.” (citations omitted) (quoting *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975))).

61. Or, in noncapital cases in Louisiana and Oregon and in capital penalty-phase proceedings in Alabama, nonunanimous but still supermajoritarian jury verdicts. LA. CONST. art. I, § 17(A) (“A case in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict.”); OR. CONST. art. I, § 11 (“[I]n the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise”); ALA. CODE § 13A-5-46(f) (LexisNexis 2015) (“The decision of the jury to recommend a sentence of death must be based on a vote of at least 10 jurors.”).

62. To strengthen the connectivity between community norms and jury sentences, some have advocated against the Supreme Court’s more than century-old formal prohibition on jury nullification, announced in *Sparf v. United States*, 156 U.S. 51, 101–02 (1895). *E.g.*, *United States v. Dougherty*, 473 F.2d 1113, 1141–42 (D.C. Cir. 1972) (Bazelon, C.J., concurring in part and dissenting in part) (“My own view rests on the premise that nullification can and

Yet this view does not account for the impact of death qualification upon the representativeness of the capital jury. Death qualification eliminates from jury service a sizable portion of the population that disagrees with the morality of the death penalty and therefore prevents jury verdicts from accurately reflecting the stance of the community on whether the death penalty is “cruel and unusual.”⁶³

In invoking juries as measures of public sentiment, the Court has failed to acknowledge the impact of death qualification.⁶⁴ For instance, dissenting in *Furman v. Georgia*, Justice Powell justified the use of jury verdicts as a measure of “evolving standards of decency” as follows:

The second and even more direct source of information reflecting the public’s attitude toward capital punishment is the jury. In *Witherspoon v. Illinois*, MR. JUSTICE STEWART, joined by JUSTICES BRENNAN and MARSHALL, characterized the jury’s historic function in the sentencing process in the following terms:

“[T]he jury is given broad discretion to decide whether or not death is ‘the proper penalty’ in a given case, and a juror’s general views about capital punishment play an inevitable role in any such decision.

“A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror. . . . Guided by neither rule nor standard, . . . a jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death.”

“[O]ne of the most important functions any jury can perform in making

should serve an important function in the criminal process. I do not see it as a doctrine that exists only because we lack the power to punish jurors who refuse to enforce the law or to re-prosecute a defendant whose acquittal cannot be justified in the strict terms of law. The doctrine permits the jury to bring to bear on the criminal process a sense of fairness and particularized justice. The drafters of legal rules cannot anticipate and take account of every case where a defendant’s conduct is ‘unlawful’ but not blameworthy, any more than they can draw a bold line to mark the boundary between an accident and negligence. It is the jury—as spokesman for the community’s sense of values—that must explore that subtle and elusive boundary.”).

63. Of course, there are other reasons why capital-jury verdicts don’t accurately capture the nation’s views on the death penalty, including the fact that they are concentrated in the geographic regions where the death penalty is most popular and where the citizenry are most supportive of bringing death cases in the first place. Recent scholarship has drawn attention to the fact that the death penalty is carried out in a small minority of counties across the country. See Robert J. Smith, Essay, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. REV. 227 (2012). However, this paper focuses on the particular impact of death qualification and how to remedy the distortions that this practice creates—particularly because it is a judicially created practice and the Court has a special role in remedying it.

64. And while the Court has explicitly rejected the argument that death qualification deprives a defendant of a jury comprised of a fair cross section of the community, *Lockhart v. McCree*, 476 U.S. 162, 176–77 (1986), this impact for Eighth Amendment purposes requires a different analysis, because the question here is not the defendant’s Sixth Amendment right to an impartial jury but rather the accuracy of the gauge of the nation’s evolving standards of decency.

such a selection is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect ‘the evolving standards of decency that mark the progress of a maturing society.’”

Any attempt to discern, therefore, where the prevailing standards of decency lie must take careful account of the jury’s response to the question of capital punishment.⁶⁵

Having thus established the relevance of jury verdicts to the inquiry into “evolving standards of decency” under the Eighth Amendment, Justice Powell went on to argue that the rate of death verdicts was consistent with the constitutionality of capital punishment.⁶⁶

Yet Justice Powell’s citation of *Witherspoon* to establish the relevance of jury verdicts to community consensus is rather incongruous. The portion of *Witherspoon* quoted, if read in full, gave an *aspirational* description of the jury’s link to the community while arguing that a jury system excluding people with conscientious objections against the death penalty could not fully express the community’s standards of decency. The full quotation reads as follows:

A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror. But a jury from which all such men have been excluded cannot perform the task demanded of it. Guided by neither rule nor standard, “free to select or reject as it [sees] fit,” a jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death. *Yet, in a nation less than half of whose people believe in the death penalty, a jury composed exclusively of such people cannot speak for the community. Culled of all who harbor doubts about the wisdom of capital punishment—of all who would be reluctant to pronounce the extreme*

65. 408 U.S. 238, 439–41 (1972) (Powell, J., dissenting) (alteration in original) (footnote and citations omitted) (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 & n.15 (1968)).

66. *Id.* at 441 (Powell, J., dissenting) (“During the 1960’s juries returned in excess of a thousand death sentences, a rate of approximately two per week. Whether it is true that death sentences were returned in less than 10% of the cases as petitioners estimate or whether some higher percentage is more accurate, these totals simply do not support petitioners’ assertion at oral argument that ‘the death penalty is virtually unanimously repudiated and condemned by the conscience of contemporary society.’ It is also worthy of note that the annual rate of death sentences has remained relatively constant over the last 10 years and that the figure for 1970—127 sentences—is the highest annual total since 1961. It is true that the sentencing rate might be expected to rise, rather than remain constant, when the number of violent crimes increases as it has in this country. And it may be conceded that the constancy in these statistics indicates the unwillingness of juries to demand the ultimate penalty in many cases where it might be imposed. But these considerations fall short of indicating that juries are imposing the death penalty with such rarity as to justify this Court in reading into this circumstance a public rejection of capital punishment.” (footnotes omitted) (quoting Transcript of Oral Argument at 21, *Aikens v. California*, 406 U.S. 813 (1972) (No. 68-5027))).

*penalty—such a jury can speak only for a distinct and dwindling minority.*⁶⁷

Decisions made by juries stripped of conscientious objectors to the death penalty do not accurately reflect contemporary standards of decency about the death penalty. The use of death-qualified jury verdicts as “objective indicia” of contemporary values produces an obviously warped data set from which to gauge “evolving standards of decency.”⁶⁸ As aptly put by Ben Cohen and Robert Smith,

Measuring the community’s sentiment concerning a specific punishment by gathering a venire, removing from the venire all people opposed to a punishment, and then taking the temperature of the remaining citizens concerning the propriety of that punishment, would be like assessing the impact of global warming by taking the temperature in a room with its air-conditioning on.⁶⁹

In fact, the very existence of the practice of death qualification—and the insistence by prosecutors that it is necessary—bears constitutional significance within any accurate assessment of “evolving standards of decency.” As Justice Stevens has noted,

Litigation involving both challenges for cause and peremptory challenges has persuaded me that the process of obtaining a “death qualified jury” is really a procedure that has the purpose and effect of obtaining a jury that is biased in favor of conviction. The prosecutorial concern that death verdicts would rarely be returned by 12 randomly selected jurors should be viewed as objective evidence supporting the conclusion that the penalty is excessive.⁷⁰

An additional concern about the impact of death qualification on the “evolving standards of decency” inquiry is the disproportionate exclusion of minorities—and, in particular, African Americans—from the constitutional conversation.⁷¹ Death qualification is an important—though by no means the only⁷²—feature of capital jury

67. *Witherspoon*, 391 U.S. at 519–20 (alteration in original) (emphasis added) (footnotes omitted) (quoting *People v. Bernette*, 197 N.E.2d 436, 443 (Ill. 1964)).

68. Susan Raeker-Jordan, *A Pro-Death, Self-Fulfilling Constitutional Construct: The Supreme Court’s Evolving Standard of Decency for the Death Penalty*, 23 HASTINGS CONST. L.Q. 455, 537, 542–43, 554 (1996).

69. G. Ben Cohen & Robert J. Smith, *The Death of Death-Qualification*, 59 CASE W. RES. L. REV. 1, 99 n.54 (2008).

70. *Baze v. Rees*, 553 U.S. 35, 84 (2008) (Stevens, J., concurring in judgment).

71. See sources cited *supra* note 44.

72. Other features of jury selection that may have a disproportionate impact on minority venire members include use of voter registration rolls as the pool of qualified jurors, see, e.g., Nina W. Chernoff, *Wrong About the Right: How Courts Undermine the Fair Cross-Section Guarantee by Confusing It with Equal Protection*, 64 HASTINGS L.J. 141, 178 n.196 (2012); peremptory strikes exercised against racial minorities, see, e.g., EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 5 (2010), <http://eji.org/sites/default/files/illegal-racial-discrimination-in-jury-selection.pdf> [<https://perma.cc>

selection that leads to “whitewashing” of juries and calls into question whether capital jury verdicts are truly representative of community values. Reincorporating *Witherspoon* strikes into the “evolving standards of decency” inquiry would recapture some of the minority voices otherwise excluded from the conversation.⁷³

Despite the common-sense reasons why the Court should account for death qualification in assessing “evolving standards of decency,” it has never done so. As a result, the Court’s conclusions that the death penalty is not “cruel and unusual punishment” have been buoyed by an inflated and inaccurate estimation of popular support for the death penalty.

II. MEASURING THE RATE OF WITHERSPOON STRIKES IN LOUISIANA CAPITAL CASES: AN EMPIRICAL BEGINNING

This Article has thus far identified a problem with the Supreme Court’s approach to measuring evolving standards of decency: its failure to account for the impact of death qualification upon capital jury verdicts. There is a second, underlying problem, however, which undoubtedly contributes to the Court’s failure in this area: the lack of comprehensive data on the rate of *Witherspoon* exclusion in actual capital trials.

Social-science surveys suggest that a substantial percentage of people *would* be subject to *Witherspoon* challenges were they in a capital venire.⁷⁴ And anecdotal statistics from various prominent Supreme Court opinions establish that in at least some cases, the rate of strikes on the basis of objections to the death penalty can be substantial. In *Witherspoon* itself, “47 veniremen [out of 95]⁷⁵ were successfully challenged for cause on the basis of their attitudes toward the death penalty.”⁷⁶ In *Wainwright v. Witt*, “the court excused 11 venirepersons for cause because they expressed opposition to the death penalty.”⁷⁷ In *Morgan v. Illinois*, “[s]eventeen

/6NWJ-K35U]; and exclusion of ex-felons from juries, *see, e.g.*, Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 113–14 (2003).

73. I will pause here to note that the distorting effect of death qualification is sharper than any distorting effect brought about by so-called “life qualification,” the corresponding requirement that sitting jurors be able to meaningfully consider imposing a life sentence rather than death. *Morgan v. Illinois*, 504 U.S. 719, 729 (1992). This is so for at least the two reasons discussed earlier in this Article. *See supra* text accompanying notes 45–49. First, due to the ordinary unanimity requirement for a death verdict in capital jury decision making, the impact of any single *Witherspoon* exclusion is more profound than the impact of any single *Morgan* exclusion, and thus the *aggregate* impact of *Witherspoon* is likely much greater than the *aggregate* impact of *Morgan*. Second, the *Morgan* standard has proved, in practice, less adept at removing automatic-death jurors from the jury box than has the *Witherspoon-Witt* standard. All this being said, I certainly do not *oppose* the collection of data regarding strike rates under *Morgan*. A comparative inquiry into the number of *Witherspoon*- and *Morgan*-excluded jurors would be an interesting and important one.

74. *See* Fitzgerald & Ellsworth, *supra* note 44, at 40–42 (finding 17.2% of a random sample of 811 eligible jurors in Alameda County, California, to be *Witherspoon* excludables).

75. *Witherspoon v. Illinois*, 391 U.S. 510, 530 n.12 (1968) (Douglas, J., concurring).

76. *Id.* at 514. Note, of course, that not all of these could be legally excluded post-*Witherspoon*.

77. *Witt v. Wainwright*, 714 F.2d 1069, 1076 (11th Cir. 1983), *rev’d*, 469 U.S. 412 (1985); *see also* *Wainwright v. Witt*, 469 U.S. 412, 415 n.1 (1985).

potential jurors were excused when they expressed substantial doubts about their ability to follow Illinois law in deciding whether to impose a sentence of death.”⁷⁸ In *Kennedy v. Louisiana*, fully forty-four jurors were excused for cause on the basis of conscientious objections to the death penalty.⁷⁹

One early study by Professor Bruce Winick collected data on capital-trial voir dire proceedings in one judicial district in Florida from 1974 to 1978 in order to analyze prosecutorial use of peremptory strikes against death-averse jurors.⁸⁰ In so doing, Professor Winick presented data from which a *Witherspoon* strike rate could be estimated.⁸¹ However, the study did not provide precise numbers of *Witherspoon*-struck jurors, and the data is at this point nearly four decades old.

There is no recent statistical information available about the aggregate rate of *Witherspoon* strikes across capital trials. This data is buried in attorneys’ notes and in transcripts of the jury voir dire proceedings in individual capital cases. Strike data are enormously labor intensive to obtain and to aggregate in a meaningful way.⁸²

78. 504 U.S. 719, 722–23 (1992) (citations omitted).

79. Cohen & Smith, *supra* note 69, at 98–99 (“Nearly a century and a half later, in 2003, Patrick Kennedy was tried by a Louisiana jury on the charge of capital rape of a child. During voir dire, the state successfully challenged for cause forty-four jurors due to their conscientious objection to the death penalty. Seventeen of the challenged jurors would consider the death penalty for the crime of murder, but refused to do so for child rape.” (footnotes omitted)). Interestingly, the seventeen jurors excused because of their unwillingness to impose death for child rape anticipated the Supreme Court’s own conclusion in reviewing Kennedy’s death sentence that the death penalty is “cruel and unusual punishment” for the nonhomicidal rape of a child. *Kennedy v. Louisiana*, 554 U.S. 407, 413 (2008).

80. Winick, *supra* note 40.

81. *Id.* at 28 & n.98.

82. It should also be noted that the information contained in reported (and unreported) death penalty opinions dealing with *Witherspoon* challenges in a commercial database such as Westlaw or LexisNexis does not produce useful aggregate data. I make this assertion after embarking on precisely such an endeavor, without fruitful results. The information available in published opinions varies widely from decision to decision. Some provide specific numbers about how many jurors in total were struck for cause and for what reasons. *See, e.g.*, *United States v. Gabrion*, 719 F.3d 511, 525–26 (6th Cir. 2013) (noting that 101 venire members were questioned, that twenty-five were excused by the court due to personal hardship, that eleven of the sixteen venire members challenged for cause by the defendant were excused, that eleven of the fourteen venire members challenged by the government excused for cause, that each side got twenty peremptory challenges, and that on appeal the defendant challenged the grant of four of the prosecutor’s for-cause challenges on *Witherspoon* grounds for being merely anti-death penalty). Some provide only information about the for-cause strikes that are being challenged. *See, e.g.*, *Young v. Stephens*, No. MO-07-CA-002-RAJ, 2014 WL 509376, at *106–15 (W.D. Tex. Feb. 10, 2014) (evaluating the challenge as to the dismissal of one potential juror for cause under *Witherspoon*). Some provide no numbers whatsoever but only mention that *Witherspoon* strikes occurred. *See, e.g.*, *Williams v. Bagley*, 380 F.3d 932, 978 (6th Cir. 2004) (Merritt, J., dissenting) (“At the voir dire, the prosecutor was successful in having the court excuse for cause those jurors predisposed to disfavor the death penalty.”). It is thus nearly impossible to aggregate the information and analyze the data in a meaningful way without scrutinizing the individual trial transcripts at insurmountable cost and with a prohibitive amount of labor. Moreover, a Westlaw or LexisNexis survey cannot accurately identify *all* the *Witherspoon* strikes in *all* capital cases in the country. It necessarily only

We need a more comprehensive and systematic consideration of the rate of *Witherspoon* strikes in capital trials. This Article takes the first strides toward an empirical assessment of the present impact of death qualification by reporting on the results of *Witherspoon* voir dire in eleven Louisiana capital trials over five years, between 2009 and 2013, in which 1445 individual jurors were questioned about their views on the death penalty. Although we cannot extrapolate nationwide *Witherspoon* strike rates from this sample, this data set provides important evidentiary confirmation that death-qualification proceedings have a constitutionally significant impact on the composition of capital juries and the outcomes of capital trials.

A. Methodology

My study involved a review of all available jury voir dire transcripts from capital trials in Louisiana that resulted in a death verdict during the five-year period from 2009 to 2013. I focused the study on cases that resulted in a death verdict because these cases purportedly constitute objective indicia of society's continued acceptance of the death penalty, and as such it is particularly important to understand the impact of death qualification in obtaining these death verdicts. In other words, these cases are check marks in the column of judicial evidence that the death penalty is *not* "cruel and unusual punishment" under prevailing community norms. How many potential jurors were struck from service in these trials because of their conscientious objections to the death penalty, and to what extent are these "check marks" actually recorded in the correct column?

Upon consulting with capital attorneys who track such information in the state and comparing this data to that reported by the Bureau of Justice Statistics, I was able to identify a total of twenty-seven capital trials and fourteen death verdicts in the state of Louisiana during the five-year period from 2009 to 2013.⁸³ I conducted

includes the information that is reported in decisions contained in the database. As a result, the data would either *overestimate* or *underestimate* the rate of *Witherspoon* strikes nationwide. The survey necessarily would not pick up on cases in which *no* jurors were struck for cause, because there would be no *Witherspoon* challenge to the death qualification proceedings. This would lead to an *overestimation* of the rate of *Witherspoon* strikes. To the extent that an opinion is likely to specify the total number or percentage of jurors struck for cause in cases in which a *large* number of *Witherspoon* strikes were made, this survey would *overestimate* the rate of *Witherspoon* strikes. And the survey necessarily would not pick up on the rate of *Witherspoon* strikes in cases in which there was (a) no appeal at all—whether because the defendant was acquitted, because the defendant did not receive the death penalty, because the defendant did not wish to appeal, or because some kind of plea agreement was entered after jury selection; (b) no challenge to the exclusion of jurors under *Witherspoon*, despite the fact that some jurors were excluded; (c) no opinion reported on Westlaw; or (d) no information concrete enough in the opinion to provide meaningful data. This would lead to an *underestimation* of the rate of *Witherspoon* strikes.

83. The Bureau of Justice Statistics has reported twelve death sentences in Louisiana between 2009 and 2013. TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 231676, CAPITAL PUNISHMENT, 2009—STATISTICAL TABLES 8 (Georgette Walsh & Jill Duncan eds., 2010), <http://www.bjs.gov/content/pub/pdf/cp09st.pdf> [<https://perma.cc/N9ZU-GUYH>] (reporting three death sentences in 2009); TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 236510, CAPITAL PUNISHMENT, 2010—

an in-depth review of eleven of the fourteen cases resulting in a death verdict.⁸⁴ Due

STATISTICAL TABLES 8 (Jill Thomas ed., 2011), <http://www.bjs.gov/content/pub/pdf/cp10st.pdf> [<https://perma.cc/5US5-ZRDW>] (reporting two death sentences in 2010); TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 242185, CAPITAL PUNISHMENT, 2011—STATISTICAL TABLES 8 (Jill Thomas ed., 2013), <http://www.bjs.gov/content/pub/pdf/cp11st.pdf> [<https://perma.cc/BUA7-D4SE>] (reporting five death sentences in 2011); TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 245789, CAPITAL PUNISHMENT, 2012—STATISTICAL TABLES 8 (Lockheed Martin & Jill Thomas eds., 2014), <http://www.bjs.gov/content/pub/pdf/cp12st.pdf> [<https://perma.cc/A7JB-GLZZ>] (reporting two death sentences in 2012); TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 248448, CAPITAL PUNISHMENT, 2013—STATISTICAL TABLES 9 (Lynn McConnell & Morgan Young eds., 2014), <http://www.bjs.gov/content/pub/pdf/cp13st.pdf> [<https://perma.cc/6HJB-7UV9>] (reporting zero death sentences in 2013).

The data I collected after consultation with capital attorneys in the state of Louisiana reflects fourteen death verdicts during the same time period. The discrepancy likely stems from the fact that the Bureau of Justice Statistics reports prisoners received under *sentences* of death rather than jury verdicts of death. According to the data I collected, in 2009 there were at least seven capital trials, three of which resulted in a death verdict: Tyrone Wells, Barry Ferguson, Amy Hebert, Felton Dorsey (death verdict), Michael Anderson (death verdict), James Magee (death verdict), and Tyrone Wells (retrial after hung jury). In 2010, there were at least three capital trials, two of which resulted in death verdicts: Dacarius Holliday (death verdict), Brian Horn (death verdict), and Alfred Jones. In 2011, there were at least nine capital trials, six of which resulted in death verdicts: Lamondre Tucker (death verdict), Isaiah Doyle (death verdict), Jeffrey Clark (death verdict), Robert McCoy (death verdict), Eric Mickelson (death verdict), Darrill Henry, Robert Carley, Michael Varnado, David Brown (death verdict), and David Baker. Note that the discrepancy between my 2011 and 2012 data and the Bureau of Justice Statistics 2011 and 2012 data stems from the fact that Robert McCoy was tried in 2011, and the jury recommended death in 2011, but the sentence was not imposed until 2012. Because it counts death prisoners entered under sentence of death, the Bureau of Justice Statistics counts Mr. McCoy in 2012; I have counted his trial in 2011. In 2012, there were at least four capital trials, one of which resulted in a death verdict: Kenneth Barnes, Robert Coleman (death verdict), Sam Jordan, and Christopher Cope. In 2013, there were at least four capital trials, two of which resulted in a death verdict: Daniel Prince, Marcus Reed (death verdict), Barry Edge, and Rodricus Crawford (death verdict). Again, there is a discrepancy here with data from the Bureau of Justice Statistics, which reported no death sentences; it is logical to assume that these individuals were not judicially sentenced to death and thus were not tallied in the government data.

84. The trials discussed are, from oldest to most recent, Felton Dorsey (Caddo Parish, May 2009; convicted as charged; death verdict recommended); James Magee (St. Tammany Parish, October 2009; convicted as charged; death verdict recommended); Isaiah Doyle (Jefferson Parish, March 2011; convicted as charged; death verdict recommended); Lamondre Tucker (Caddo Parish, May 2011; convicted as charged; death verdict recommended); Jeffrey Clark (St. Tammany Parish jury sitting in St. Francisville Parish, May 2011; convicted as charged; death verdict recommended); Robert McCoy (Bossier Parish, August 2011; convicted as charged; death verdict recommended); Eric Mickelson (Caddo Parish, August 2011; convicted as charged; death verdict recommended); David Brown (St. Tammany Parish jury sitting in St. Francisville Parish, October 2011; convicted as charged; death verdict recommended); Robert Coleman (Caddo Parish, January 2012; convicted as charged; death verdict recommended); Marcus Reed (Caddo Parish, September 2013; convicted as charged; death verdict recommended); Rodricus Crawford (Caddo Parish, November 2013; convicted

to case-specific circumstances, I was unable to review the transcripts of three of the fourteen cases.⁸⁵ My study thus includes 78.6% of the capital trials resulting in a death verdict over the five-year period. These eleven trials encompassed the questioning of 1445 venire members. From the review of these transcripts, I was able to compile statistics about the patterns of *Witherspoon* strikes in these eleven cases.

Four of these transcripts also contained information on the record about the race of each potential juror.⁸⁶ From this additional information, I gathered statistics about the racial impact of death qualification in these trials. Beyond this, I obtained demographic information available through the Louisiana Secretary of State about each individual registered voter on the voter registration rolls in one parish—Caddo Parish—in the years 2009 and 2013. By comparing the names of venire members in the voir dire transcripts to the information about listed registered voters' race, I compiled statistics about the racial impact of death qualification in three additional trials. Thus, this Article reports individualized findings about the racial impact of death qualification in seven of the eleven trials.

The results of the study are detailed below.

B. Results

1. *Witherspoon* Strike Rates

As detailed below in Table 1, an analysis of the full data set of eleven cases reveals that an average of 22.2%,⁸⁷ between one-fifth and one-quarter, of the jury venire was struck for cause on the basis of *Witherspoon* due to inability to meaningfully consider imposing the death penalty.⁸⁸ A total of 325 venire members out of 1445 venire members questioned were excused for cause on this basis.⁸⁹ The highest percentage of

as charged; death verdict recommended). It should be noted that the trial transcript reviewed for David Brown is a draft version; his official record has not yet been lodged in the Supreme Court.

85. These cases are Michael Anderson (whose conviction was overturned with the grant of a motion for new trial, and who ultimately pled nolo contendere to the murder charges, with no appeal ever being filed and no appellate record lodged) and Brian Horn and Dacarius Holliday (whose appellate records had not yet been lodged at the time of the study).

86. Race data was placed on the record in the trials of Robert Coleman, Lamondre Tucker, Eric Mickelson (although the race data is missing for fifteen venire members in that case), and Isaiah Doyle.

87. The median percentage was 22.6%. The percentage of 22.2% was arrived at by averaging the total excusal rate for each of the eleven trials. A nearly identical number is reached if one takes the percentage of individual jurors excluded across the eleven trials. A total of 325 venire members out of 1445 venire members questioned were excused for cause on the basis of their objections to the death penalty, which yields a percentage of 22.5%.

88. Within this category, I included jurors struck under *Witherspoon* and jurors struck under LA. CODE CRIM. PROC. ANN. art. 798 (2013), which codifies *Witherspoon* into state law.

89. Interestingly, the *Witherspoon* strike rate I find is three times that estimated in Professor Winick's earlier study. He found that 147 out of 1116 jurors expressed scruples against the death penalty and that ninety-two of these jurors were excluded for cause. Winick, *supra* note 40, at 30 tbl.1. He then estimated, without analyzing the record-based reasons for each individual exclusion, that seventy-four of these jurors were dismissed on *Witherspoon*

Witherspoon strikes in a single case in which a death verdict was issued was 32.1%.⁹⁰ In no case was the excusal rate lower than 10%. In raw numbers, rather than percentages, across all the cases an average of 29.5 potential jurors were struck under *Witherspoon* in each voir dire proceeding.

By contrast, the rate of strikes of “automatic death penalty” jurors under *Morgan v. Illinois* was considerably lower. Within this category I counted both individuals who were struck because they believed that death was the only appropriate punishment and individuals who were struck because they were unable to meaningfully consider mitigating information. An average of 12.4% of venire members were “life disqualified” in these eleven trials.⁹¹ In raw numbers, a total of 192 venire members out of the 1445 questioned were excused for cause on the basis of their inability to consider a life sentence or mitigating factors.

In an important respect, these reported rates underrepresent the percentage of the viable jury pool removed under *Witherspoon* and *Morgan*. In many of these voir dire proceedings, inquiries as to personal hardship and other bases for excusal (such as personal connections to the case) occurred during or before the *Witherspoon* proceedings, so potential jurors were struck for other reasons without ever reaching a determination on the question of death qualification. This means that the above percentages of *Witherspoon*-disqualified jurors may substantially underestimate the number of people who would have been *Witherspoon* excludable had that line of questioning been reached, and it also means that death qualification eliminated a much larger percentage of the jurors who might otherwise have sat on the jury than indicated.

Additionally, the data corroborate the theory that death-qualification proceedings have a larger impact upon the jury composition than the *Witherspoon* exclusions themselves. As noted above, death qualification can be used as a signaling function to capital attorneys about juror preferences that will lead them to strike death- or life-averse jurors on peremptory grounds even if the attorneys’ for-cause challenges are unsuccessful. For example, in one trial, the state ultimately peremptorily struck three of the five jurors who were unsuccessfully challenged under *Witherspoon*;⁹² in another trial, two of three;⁹³ and in another trial, two of two.⁹⁴ Defense attorneys similarly struck jurors peremptorily who had expressed a pro-death attitude but about whom the judge had denied a for-cause challenge.⁹⁵ In fact, it was much more common for judges to deny defense for-cause challenges under *Morgan* than to deny state

grounds. *Id.* at 28 & n.98. If his estimate was correct, there was a strike rate of 6.6%; if not, the strike rate could have ranged from a low of 0% to a high of 8.2%. Whether the discrepancy between my results and his reflects evolving standards of decency is a question that could only be addressed with more data.

90. This exclusion rate occurred in the trial of Isaiah Doyle in Jefferson Parish.

91. The median percentage was 10.8%.

92. Trial of Jeffrey Clark.

93. Trial of Isaiah Doyle.

94. Trial of James Magee.

95. In the Robert Coleman trial, for example, nine *Morgan* challenges were denied, and the defense ultimately exercised peremptory strikes against six of these jurors.

Table 1. Number and Percentage of Venire Members Struck Under *Witherspoon* (Automatic Life) and *Morgan* (Automatic Death)

Defendant	Year	Parish	Venire Size	Witherspoon Exclusions		Morgan Exclusions	
				Absolute Number	Percentage of Venire	Absolute Number	Percentage of Venire
Brown	2011	St. Tammany	180	43	23.9%	16	8.9%
Clark ⁹⁶	2011	St. Tammany	180	33	18.3%	34	18.9%
Coleman	2012	Caddo	124	28	22.6%	22	17.7%
Crawford	2013	Caddo	83	10	12.0%	9	10.8%
Dorsey	2009	Caddo	91	25	27.5%	8	8.8%
Doyle	2011	Jefferson	224	72	32.1%	38	17.0%
Magee	2009	St. Tammany	118	18	15.3%	19	16.1%
McCoy	2011	Bossier	164	21	12.8%	22	13.4%
Mickelson	2011	Caddo	102	28	27.5%	10	9.8%
Reed	2013	Caddo	84	19	22.6%	4	4.8%
Tucker	2011	Caddo	95	28	29.5%	10	10.5%
			<i>Average</i>	29.5	22.2%	17.5	12.4%
			<i>Median</i>	28	22.6%	16	10.8%
			<i>Standard Deviation</i>	17	6.8%	11	4.5%
			<i>Sum Total</i>	325	22.5% ⁹⁷	192	13.3% ⁹⁸

96. Jeffrey Clark's July 2010 capital trial ended in a mistrial due to prosecutorial misconduct during opening statements. See Josh Auzenne, *Opening Remark Leads to Mistrial for Accused Prison Guard Killer*, KSLA News (July 15, 2010), <http://www.ksla.com/story/12812109/opening-remark-leads-to-mistrial-for-accused-prison-guard-killer> [https://perma.cc/A5NW-L2Z8]. My study only includes data from the voir dire in his *second* trial, which began in April 2011 and which resulted in a death verdict.

97. This number represents the percentage of all venire members across all trials that were excluded under *Witherspoon* (in other words, 325 out of the total 1445 venire members).

98. This number represents the percentage of all venire members across all trials that were excluded under *Morgan* (in other words, 192 out of the total 1445 venire members).

for-cause challenges under *Witherspoon*—an average of 6.1 *Morgan* denials per trial versus an average of only 2.2 *Witherspoon* denials per trial. This discrepancy may reflect a number of different causes: the lesser persuasiveness of defense attorneys, the lesser willingness of judges to entertain defense motions, or the greater difficulty in satisfying the dictates of *Morgan* than the dictates of *Witherspoon*. In any event, the data show that, even aside from subsequent for-cause challenges on other grounds, a number of death- and life-averse jurors who were kept in the jury venire during death-qualification proceedings were nonetheless excluded from jury service through the exercise of peremptory challenges.⁹⁹

Even using the more conservative numbers I have supplied, which do not take into account the impact of additional peremptory challenges and other challenges for cause, the strike rates of conscientious objectors to the death penalty are substantial. On average, between one-fifth and one-quarter of these Louisiana venire members in capital cases where a death verdict was imposed were excluded from jury service on the basis of their opposition to the death penalty. The ensuing death verdicts were obtained *only* after removing this sizeable percentage of the community from the jury box. To call these verdicts representative of community acceptance of the death penalty fundamentally mischaracterizes the community's standards of decency and creates a deeply deceptive "objective indicator" for the Eighth Amendment analysis.

2. Race and *Witherspoon* Strikes

When the racial impact of the *Witherspoon* proceedings is analyzed, the picture becomes more troubling still. In my sample set, black venire members were excused on the basis of conscientious objections to the death penalty at a notably higher rate than their white counterparts.

Four of the cases analyzed contained information on the record about the race of the venire members.¹⁰⁰ Additionally, I was able to access information made available by the Louisiana Secretary of State concerning the demographics of registered voters in Caddo Parish in 2009 and 2013, and to compare the registered-voter lists to the jury lists in three additional Caddo Parish trials.¹⁰¹ Thus, I was able to collect individualized data on the race of all of the venire members for seven of the eleven trials. These seven trials involved the questioning of 803 potential jurors.

The analysis of the race-based data is reported below in Tables 2 through 5.

As reported in Table 2, across the seven cases for which juror-specific information

99. Similarly, Professor Winick found that prosecutors frequently struck death-averse jurors who were not successfully challenged under *Witherspoon*. Winick, *supra* note 40, at 28 (finding that "the prosecution used peremptory challenges . . . [to] eliminate[] 77% of the [remaining] scrupled jurors").

100. The information was available for Isaiah Doyle (Jefferson Parish), as well as for Eric Mickelson, Lamondre Tucker, and Robert Coleman (all Caddo Parish). In Eric Mickelson's trial, the race of fifteen of the 102 jurors (including three jurors struck for cause on *Witherspoon* grounds and three jurors struck for cause on *Morgan* grounds) inexplicably was not put on the record. The race of the remaining fifteen jurors was obtained through the Caddo Parish voter registration rolls.

101. Due to the prohibitive cost of obtaining data from more than one parish, I was unable to obtain similar demographic information for Bossier and St. Tammany Parishes.

on race was available, on average, 55.8% of the venire was white and 41.6% was black. In raw numbers, 460 out of 803 known-race venire members (or 57.3%) were white; 309 out of the 803 known-race venire members (or 38.5%) were black.

Table 2. Black-White Composition of Jury Venires

Trial	Venire	White		Black		Other	
		Absolute Number	% of Venire	Absolute Number	% of Venire	Absolute Number	% of Venire
Coleman	124	73	58.9%	50	40.3%	1	0.8%
Crawford	83	48	57.8%	35	42.2%	0	0.0%
Dorsey	91	51	56.0%	39	42.9%	1	1.1%
Doyle	224	146	65.2%	54	24.1%	24	10.7%
Mickelson	102	47	46.1%	53	52.0%	2	2.0%
Reed	84	46	54.8%	38	45.2%	0	0.0%
Tucker	95	49	51.6%	42	44.2%	4	4.2%
<i>Average</i>	114.7	65.7	55.8%	44.1	41.6%	4.6	2.7%
<i>Median</i>	95	49	56.0%	42	42.2%	1	1.1%
<i>Standard Deviation</i>	50.2	36.6	6.0%	7.8	8.5%	8.7	3.8%
<i>Sum Total</i>	803	460	57.3% ¹⁰²	311	38.7% ¹⁰³	32	4.0%

As reported in Table 3, black jurors were struck under *Witherspoon* at markedly higher rates than white jurors. In the seven cases for which individualized information on race was available, of all the jurors struck on the grounds of their objections to the death penalty, an average of 38.7% were white, while 59.8% were black.¹⁰⁴ However, the venires were, on average, 55.8% white and 41.6% black.

The racially disparate *Witherspoon* strike rate had a marked impact upon the racial composition of the remaining jury pool. On average, fully 35.2%—more than one-third—of the black potential jurors in the venire were excluded on the basis of their opposition to the death penalty. By contrast, only 17.0% of the total white jury pool was struck. If one looks holistically across trials, 112 out of the 311 black venire members were excluded (an average of 36.0%), while 92 out of 460 white venire members were excluded (an average of 20.0%). Consequently, black jurors were 1.8 times more likely to be struck under *Witherspoon* than white jurors.

The one exception to the pattern of disproportionate *Witherspoon* strikes of black as opposed to white prospective jurors was the voir dire in Isaiah Doyle's trial, which took place in Jefferson Parish. Although the *Witherspoon* strike rate for black jurors was roughly consistent with the strike rate of the trials in Caddo Parish (37.0% of the black members of the jury venire were struck for cause on *Witherspoon* grounds, compared to an average of 34.9% in the other six Caddo trials), the *Witherspoon* strike rate for whites was much higher than in the Caddo Parish trials (32.2% of the white members of the jury venire were struck for cause on *Witherspoon* grounds, compared to an average of 14.5% in the six Caddo trials). Thus, in the Doyle trial,

102. This number represents the overall percentage of white venire members among the 803 known-race venire members.

103. This number represents the overall percentage of black venire members among the 803 known-race venire members.

104. This average was compiled by taking an average of the total percentage for each case.

the strike rates of blacks and whites were roughly similar to their proportion of the jury venire, with a slightly higher rate of exclusion for black jurors. The overall impact was a considerably *higher* total strike rate for this trial than the others: fully 32.1% of the venire was excluded on account of conscientious objections to the death penalty, the highest exclusion rate of any trial in the study.

The overall findings of a disproportionate rate of exclusion of black venire members corroborate scholarship hypothesizing that death-qualification proceedings have a “whitewashing” effect, stripping the jury venire of many otherwise qualified minority jurors and further reducing minority participation on capital juries.¹⁰⁵ The significance of this “whitewashing” must be assessed not only in its impact upon the outcomes of individual cases¹⁰⁶ but also in its impact upon the Eighth Amendment inquiry into “evolving standards of decency.” When black venire members are disproportionately removed from capital juries, they are removed from the conversation about the constitutionality of the death penalty under the Eighth Amendment. The “evolving standards of decency” that the Court is considering are standards attributable to a whiter and less diverse population than would be the case without death qualification.

It is worth noting that, as reported in Table 4, the *Morgan* disqualifications had an opposite racial impact than the *Witherspoon* disqualifications, striking substantially more white jurors than black. On average across the cases with individualized race data, the *Morgan*-struck jurors were 68.6% white and 26.3% black. Only 22 black jurors were struck under *Morgan*, compared to 112 black jurors struck under *Witherspoon*. An average of 12.7% of all the white venire members were struck under *Morgan*, while an average of only 6.8% black venire members were struck under *Morgan*.

As reported in Table 5, the ultimate racial composition of the jury venire changed through the process of death qualification. Across the eleven trials, the venire started out, on average, 55.8% white and 41.6% black. Once all jurors excluded under *Witherspoon* were removed from the jury venire, however, the remaining pool was, on average, 61.3% white and 35.5% black. *Morgan* strikes slightly reduced the racially disparate impact of *Witherspoon* on the jury venire: leaving aside *all* jurors excluded during death qualification under both *Witherspoon* and *Morgan*, the remaining venire was, on average, 60.0% white and 37.1% black. Still, the jury venire *after* death qualification proceedings was comprised of a higher percentage of whites and a lower percentage of blacks than the original demographic makeup.

These numbers can also be understood in terms of the ratio of black to white jurors. On average, for every black juror in the original venire, there were 1.3 white jurors. For every black juror that survived *Witherspoon* strikes, there were 1.7 white jurors that survived *Witherspoon* strikes. For every black juror remaining after both *Witherspoon* and *Morgan* strikes, there were 1.6 white jurors.

105. See *supra* note 44.

106. See, e.g., William J. Bowers, Benjamin D. Steiner & Marla Sandys, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 193 (2001) (finding that “[t]he presence of five or more white males on the jury dramatically increased the likelihood of a death sentence in the B/W cases” and that “[t]he presence of black male jurors in these B/W cases, by contrast, substantially reduced the likelihood of a death sentence”).

Table 3. Racial Impact of *Witherspoon* Exclusions

Trial	Venire			<i>Witherspoon</i> Exclusions				Impact of <i>Witherspoon</i> Exclusions on Venire	
	Total	% White	% Black	Total	White	% White	Black	% of White Venire Members Struck	% of Black Venire Members Struck
Coleman	124	58.9%	40.3%	28	9	32.1%	19	12.3%	38.0%
Crawford	83	57.8%	42.2%	10	4	40.0%	6	8.3%	17.1%
Dorsey	91	56.0%	42.9%	25	9	36.0%	16	17.6%	41.0%
Doyle	224	65.2%	24.1%	72	47	65.3%	20	32.2%	37.0%
Mickelson	102	46.1%	52.0%	28	6	21.4%	22	12.8%	41.5%
Reed	84	54.8%	45.2%	19	9	47.4%	10	19.6%	26.3%
Tucker	95	51.6%	44.2%	28	8	28.6%	19	16.3%	45.2%
<i>Average</i>	114.7	55.8%	41.6%	30	13.1	38.7%	16	17.0%	35.2%
<i>Median</i>	95	56.0%	42.9%	28	9	36.0%	19	16.3%	38.0%
<i>Standard Deviation</i>	50.2	6.0%	8.5%	19.6	15.0	14.3%	5.9	7.7%	9.9%
<i>Sum Total</i>	803	57.3%	38.7%	210	92	43.8%	112	20.0%	36.0%

Table 4. Racial Impact of *Morgan* Exclusions

Trial	Venire			<i>Morgan</i> Exclusions				Impact of <i>Morgan</i> Exclusions on Venire	
	Total	% White	% Black	Total	White	% White	Black	% of White Venire Members Struck	% of Black Venire Members Struck
Coleman	124	58.9%	40.3%	22	17	77.3%	5	23.3%	10.0%
Crawford	83	57.8%	42.2%	9	6	66.7%	3	7.2%	8.6%
Dorsey	91	56.0%	42.9%	8	6	75.0%	1	11.8%	2.6%
Doyle	224	65.2%	24.1%	38	29	76.3%	4	19.9%	7.4%
Mickelson	102	46.1%	52.0%	10	5	50.0%	5	10.6%	9.4%
Reed	84	54.8%	45.2%	4	3	75.0%	1	3.6%	2.6%
Tucker	95	51.6%	44.2%	10	6	60.0%	3	12.2%	7.1%
<i>Average</i>	114.7	55.8%	41.6%	14.4	10.3	68.6%	3.1	12.7%	6.8%
<i>Median</i>	95	56.0%	42.9%	10	6	75.0%	3	11.8%	7.4%
<i>Standard Deviation</i>	50.2	6.0%	8.5%	11	9.4	10.3%	1.7	6.9%	3.1%
<i>Sum Total</i>	803	57.3%	38.7%	101	72	71.3%	22	15.7%	7.1%

Table 5. Racial Composition of Venire Before and After Death Qualification

Trial	Venire (Before <i>Witherspoon</i> and <i>Morgan</i> strikes)		Remaining Venire After Excluding Jurors Under <i>Witherspoon</i>		Remaining Venire After Excluding Jurors Under <u>Both</u> <i>Witherspoon</i> <u>and</u> <i>Morgan</i>	
	% White	% Black	% White	% Black	% White	% Black
Coleman	58.9%	40.3%	66.7%	32.3%	63.5%	35.1%
Crawford	57.8%	42.2%	60.3%	39.7%	59.4%	40.6%
Dorsey	56.0%	42.9%	63.6%	34.8%	62.1%	37.9%
Doyle	65.2%	24.1%	65.1%	22.4%	61.4%	26.3%
Mickelson	46.1%	52.0%	55.4%	41.9%	56.3%	40.6%
Reed	54.8%	45.2%	56.9%	43.1%	55.7%	44.3%
Tucker	51.6%	44.2%	61.2%	34.3%	61.4%	35.1%
<i>Average</i>	55.8%	41.6%	61.3%	35.5%	60.0%	37.1%
<i>Median</i>	56.0%	42.9%	61.2%	34.8%	61.4%	37.9%
<i>Standard Deviation</i>	6.0%	8.5%	4.2%	7.1%	3.0%	5.8%

3. Data Significance and Limitations

The data analysis above bears immediate and potent significance. It shows that, in the sample set of Louisiana cases, a sizeable number of people were removed from jury service for cause due to their conscientious objections to the death penalty. It provides strong evidence that death verdicts would be unattainable without death qualification and that the number of death verdicts obtained in practice does not present a complete or accurate portrait of death penalty support within the community. Finally, it provides support for the argument that death qualification bears a disproportionate impact upon black venire members.

Of course, there are methodological limitations to the data that make it difficult to accurately extrapolate these findings to the nation as a whole. The sampled cases represent more than three-quarters of the capital cases resulting in a death verdict in Louisiana over a five-year period and encompasses individualized data about 1445 potential jurors, but it is not a representative sample of cases and jurors nationwide.¹⁰⁷ Moreover, I have collected data only about cases that resulted in a death verdict. While I see this data set as the most important indicator of the degree of distortion of the “objective indicator” of capital jury verdicts, data on the strike rates in cases resulting in life verdicts would also be telling about the degree of opposition to the death penalty in various localities.

Moreover, Louisiana has unique features that may make it unrepresentative of other states. For example, it has a large black population,¹⁰⁸ concentrated especially

107. From 2009 to 2013, there were 482 death sentences imposed nationwide. *Death Sentences in the United States from 1977 by State and by Year*, DEATH PENALTY INFO. CTR. (2016), <http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008> [https://perma.cc/9GQ9-LADC].

108. According to U.S. census data, in 2013, Louisiana was 32.4% black, while the national average was 13.2%. U.S. Census Bureau, *Annual Estimates of the Resident Population by Sex, Race, and Hispanic Origin for the United States, States, and Counties: April 1, 2010*

heavily in Caddo Parish,¹⁰⁹ where six of the eleven cases were prosecuted; it has a large Catholic community,¹¹⁰ which may be particularly opposed to the death penalty;¹¹¹ and there is an acute distrust of police¹¹² and the criminal-justice system¹¹³ in certain regions, particularly amongst African Americans.

At the same time, much of Louisiana's population is deeply conservative,¹¹⁴ and

to July 1, 2013, AM. FACTFINDER (June 2014), <http://factfinder.census.gov/bkmk/table/1.0/en/PEP/2013/PEPSR6H/0100000US|0400000US22?slice=Year~est72013> [<https://perma.cc/U6HA-DL3C?type=image>].

109. In 2014, the U.S. Census Bureau estimated that 121,781 out of 252,603 Caddo Parish residents (or 48.2%) were black. U.S. Census Bureau, *Annual Estimates of the Resident Population by Sex, Race, and Hispanic Origin for the United States, States, and Counties: April 1, 2010 to July 1, 2014*, AM. FACTFINDER (June 2015), <http://factfinder.census.gov/bkmk/table/1.0/en/PEP/2014/PEPSR6H/0500000US22017?slice=Year~est72014> [<https://perma.cc/SST9-TFHB?type=image>].

110. In 2010, Louisiana was reported to be 26% Catholic, the tenth most Catholic state per capita and the Southern state with the highest per capita Catholic population. Ass'n of Statisticians of Am. Religious Bodies, U.S. RELIGION CENSUS, 1952 TO 2010, <http://rcms2010.org/compare.php> [<https://web.archive.org/web/20160401063321/http://www.rcms2010.org/compare.php>] (under "By Individual Religious Group," select "2010," "State," and "Catholic Church").

111. See *The Church's Anti-Death Penalty Position*, U.S. CONF. CATH. BISHOPS (2016), <http://www.usccb.org/issues-and-action/human-life-and-dignity/death-penalty-capital-punishment/catholic-campaign-to-end-the-use-of-the-death-penalty.cfm> [<https://perma.cc/M3E8-K3QH>].

112. See, e.g., Jarvis DeBerry, *Crime Fight Crippled by Distrust of New Orleans Police Department*, TIMES-PICAYUNE (Mar. 11, 2012, 9:00 AM), http://www.nola.com/opinions/index.ssf/2012/03/crime_fight_crippled_by_distrust.html [<https://perma.cc/JR8V-G2MP>]; Letter from Mitch Landrieu, Mayor of New Orleans, to Eric Holder, Attorney Gen. of the U.S., (May 5, 2010), http://media.nola.com/crime_impact/other/LettertoAttyGenHolder.050510.pdf [<https://perma.cc/QGC5-PZUK>] (inviting the Department of Justice to investigate the New Orleans Police Department and partner with the city in generating reform).

113. The Caddo Parish District Attorney's office, for example, has recently been the focus of scrutiny for its racially disparate exercise of peremptory strikes. URSULA NOYE, REPRIEVE AUSTL., BLACKSTRIKES: A STUDY OF THE RACIALLY DISPARATE USE OF PEREMPTORY CHALLENGES BY THE CADDO PARISH DISTRICT ATTORNEY'S OFFICE (2015), https://blackstrikes.com/resources/Blackstrikes_Caddo_Parish_August_2015.pdf [<https://perma.cc/WAQ6-MWJP>]; Adam Liptak, *Exclusion of Blacks from Juries Raises Renewed Scrutiny*, N.Y. TIMES (Aug. 16, 2015), <http://www.nytimes.com/2015/08/17/us/politics/exclusion-of-blacks-from-juries-raises-renewed-scrutiny.html> [<https://perma.cc/2BBZ-67MR>]. In recent years, the Parish also came under fire for continuing to fly a Confederate flag outside the courthouse; the flag was taken down in 2011. *Caddo Parish Officials Vote To Remove Confederate Flag*, TIMES-PICAYUNE (Nov. 3, 2011, 10:45 PM), http://www.nola.com/politics/index.ssf/2011/11/caddo_parish_officials_vote_to.html [<https://perma.cc/Z6RT-CLHP>]. There is continuing debate over whether to remove a Confederate monument from outside the courthouse doors. Sara Machi, *Shreveport NAACP Calls for Removal of Confederate Monument from Caddo Courthouse*, KTBS (Jun. 24, 2015, 9:07 PM), <http://www.ktbs.com/story/29402444/shreveport-naacp-calls-for-removal-of-confederate-monument-from-caddo-courthouse> [<https://perma.cc/4BYT-TMUV>].

114. Frank Newport, *Mississippi, Alabama and Louisiana Most Conservative States*, GALLUP (Feb. 6, 2015), <http://www.gallup.com/poll/181505/mississippi-alabama-louisiana-conservative-states.aspx> [<https://web.archive.org/web/20160506135202/http://www.gallup.com>]

there is a strong punitive, law-and-order culture that has led to the highest incarceration rate in the nation.¹¹⁵ Louisiana is far from the liberal stronghold of Massachusetts, where Dzhokhar Tsarnaev was sentenced to death in spite of widespread community sentiment against the death penalty. Caddo Parish, where six of these eleven cases were prosecuted, produced the highest per capita rate of death sentences of any county with four or more death sentences between 2010 and 2014.¹¹⁶ Louisiana falls roughly in the middle of death-penalty states in terms of its per capita rate of death sentences between 1977 and 2013 with the twelfth-highest rate of death sentences over this time period, coming in just behind Texas.¹¹⁷ Thus, Louisiana has some features that make it representative of death-penalty states nationwide, and some features that may make it somewhat aberrational.

Aside from any idiosyncrasies in the data that may arise from the focus on Louisiana cases, there are a multitude of factors influencing the rate of *Witherspoon* strikes in any particular case that limit the predictive value of any single trial. The number of *Witherspoon* strikes varies considerably depending on the prosecutor's ardor or tenacity in pursuing *Witherspoon* challenges, the defense attorney's skill at rehabilitating challenged jurors, the judge's individual receptiveness to *Witherspoon* challenges, the manner in which the voir dire questioning is conducted (by the judge, by the attorneys, with the assistance of questionnaires, through individualized questioning outside the presence of other jurors, and so forth), and many other factors. Even within my sample of cases, and within the same exact parish, there were some notable differences between *Witherspoon* strike rates across cases. Rodricus Crawford's case, for example, was an apparent outlier with 12.0% of the jury venire

/poll/181505/mississippi-alabama-louisiana-conservative-states.aspx]. More recent polling ranks Louisiana as the eighth-most conservative state. Jeffrey M. Jones, *Red States Outnumber Blue for First Time in Gallup Tracking*, GALLUP (Feb. 3, 2016), <http://www.gallup.com/poll/188969/red-states-outnumber-blue-first-time-gallup-tracking.aspx> [https://web.archive.org/web/20161104040828/http://www.gallup.com/poll/188969/red-states-outnumber-blue-first-time-gallup-tracking.aspx].

115. LAUREN E. GLAZE & DANIELLE KAELE, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 248479, CORRECTIONAL POPULATIONS IN THE UNITED STATES: 2013, at 11 (2014), <http://www.bjs.gov/content/pub/pdf/cpus13.pdf> [https://perma.cc/4KWD-YYHD] (reporting that Louisiana incarcerates 1420 individuals per 100,000 adults, whereas Maine, by contrast, incarcerates 350 individuals per 100,000 adults).

116. Campbell Robertson, *The Prosecutor Who Says Louisiana Should 'Kill More People,'* N.Y. TIMES (July 7, 2015), <http://www.nytimes.com/2015/07/08/us/louisiana-prosecutor-becomes-blunt-spokesman-for-death-penalty.html> [https://perma.cc/JE46-WMT4] ("Caddo Parish, here in the northwestern corner of the state, is one of these counties. Within Louisiana, where capital punishment has declined steeply, Caddo has become an outlier, accounting for fewer than 5 percent of the state's death sentences in the early 1980s but nearly half over the past five years. Even on a national level Caddo stands apart. From 2010 to 2014, more people were sentenced to death per capita here than in any other county in the United States, among counties with four or more death sentences in that time period.").

117. *Death Sentences Per Capita by State*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/death-sentences-capita-state> [https://perma.cc/GUE4-HS7R] (listing Louisiana as issuing 0.355 death sentences per 10,000 people and listing Texas as issuing 0.380 death sentences per 10,000 people).

struck on *Witherspoon* grounds, while in the other five Caddo Parish cases, the strike rate ranged from 22.6% to 29.5%.

In light of these methodological constraints, the goal of this study is not to capture a complete picture of the impact of death qualification on capital trials in the United States as a whole. Indeed, these limitations point to the urgent need for additional study of the practice of death qualification and for systematic, widespread collection of data on strike rates to more accurately gauge *Witherspoon*'s impact.

Notwithstanding these limitations, however, the findings presented above are substantial enough that they warrant immediate judicial recognition of the constitutionally cognizable role that death qualification plays in influencing the outcomes of capital jury trials and demand judicial consideration of *Witherspoon* exclusions in evaluating the nation's evolving standards of decency on the death penalty.

Without the *Witherspoon* data reported above, a court considering the constitutionality of the death penalty would observe that, over a five-year span, Louisiana saw twenty-seven capital trials, fourteen of which—nearly half—resulted in a death verdict. Although certainly not overwhelming evidence that the death penalty was broadly accepted within the state, a court could interpret this data to reflect that the death penalty was not wholly out of keeping with the community's "evolving standards of decency." Yet the findings reported above should make us deeply skeptical of any such conclusion. The eleven death verdicts studied here were obtained only by striking one out of every four to five prospective jurors due to their fundamental opposition to the death penalty. The death verdicts were obtained by striking more than one of every *three* prospective black jurors for that same reason. And, due to the requirement that a death verdict be unanimous, if any single *Witherspoon*-excluded juror had made it into the jury box in any of these trials, the result could have been different. It is likely that few of these death verdicts—if any—would have been sustained absent the practice of death qualification. Thus, when integrating *Witherspoon* strike data alongside the number of death verdicts as "objective indicia" of "evolving standards of decency," community values look dramatically different, and the constitutionality of the death penalty is cast in grave doubt.

III. FINDING THE EIGHTH AMENDMENT'S LOST JURORS

In this Part, I offer concrete suggestions for how the Court should account for *Witherspoon* strike rates in a more refined way over time. First, beginning now, the Court should explicitly consider the practice of death qualification and, to the extent available, *Witherspoon* strike rates in its Eighth Amendment analysis. Second, death penalty states should mandate and systematize the collection of data about these strikes so that information is available for judicial analysis going forward.

A. Operationalizing the "Objective Indicator"

Already, courts considering the constitutionality of the death penalty have enough information to begin considering *Witherspoon* strikes as "objective indicia" of "evolving standards of decency." The persistence of the practice of death qualification and the initial findings presented in the study above provide ample basis for questioning whether death verdicts truly represent community endorsement of the death penalty. If the Supreme Court acts quickly and takes up Justice Breyer's call

to reconsider the constitutionality of the death penalty, it should account for existing evidence of the impact of death qualification in its Eighth Amendment analysis.

It would be difficult, if not impossible, to articulate a precise formula to follow in accounting for *Witherspoon* strikes; “evolving standards of decency” have always been understood in the gestalt, and there is no existing rigid method for determining whether a particular punishment practice violates the Eighth Amendment. While the Court has stated clearly the types of objective indicators it looks to,¹¹⁸ it has not enumerated how heavily each indicator should weigh or what the tipping point might be between a constitutional or unconstitutional practice. With respect to legislative trends, for example, in recent years, the Court has looked to the *absolute number* and/or the *percentage* of states adopting a particular practice¹¹⁹ and to the *direction* or *consistency of change* in rejecting or adopting the practice¹²⁰—or both. With respect to jury sentencing practices, the Court has similarly looked to the frequency and/or proportion of jury verdicts of death in a particular type of case and roughly

118. *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002).

119. *Id.* at 334 (“In our view, the two state statutes prohibiting execution of the mentally retarded, even when added to the 14 States that have rejected capital punishment completely, do not provide sufficient evidence at present of a national consensus.”); *Ford v. Wainwright*, 477 U.S. 399, 408 (1986) (“Today, no State in the Union permits the execution of the insane.”); *Enmund v. Florida*, 458 U.S. 782, 792–93 (1982) (“Thus only a small minority of jurisdictions—eight—allow the death penalty to be imposed solely because the defendant somehow participated in a robbery in the course of which a murder was committed. . . . Moreover, of the eight States which have enacted new death penalty statutes since 1978, none authorize capital punishment in such circumstances. While the current legislative judgment with respect to imposition of the death penalty where a defendant did not take life, attempt to take it, or intend to take life is neither ‘wholly unanimous among state legislatures’ nor as compelling as the legislative judgments considered in *Coker*, it nevertheless weighs on the side of rejecting capital punishment for the crime at issue.” (footnote and citations omitted) (quoting *Coker v. Georgia*, 433 U.S. 584, 596 (1977) (plurality opinion)); *Coker*, 433 U.S. at 594 (plurality opinion) (“Of the 16 States in which rape had been a capital offense, only three provided the death penalty for rape of an adult woman in their revised statutes [post-*Furman*].”).

120. *Hall v. Florida*, 134 S. Ct. 1986, 1997 (2014) (“These aggregate numbers are not the only considerations bearing on a determination of consensus. Consistency of the direction of change is also relevant.”); *Roper v. Simmons*, 543 U.S. 551, 566 (2005) (“The number of States that have abandoned capital punishment for juvenile offenders since *Stanford* is smaller than the number of States that abandoned capital punishment for the mentally retarded after *Penry*; yet we think the same consistency of direction of change has been demonstrated. . . . Any difference between this case and *Atkins* with respect to the pace of abolition is thus counterbalanced by the consistent direction of the change.”); *Atkins*, 536 U.S. at 315–16 (“It is not so much the number of these States that is significant, but the consistency of the direction of change. Given the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime, the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal.”).

estimated whether this tally supports or weighs against the comportment of the sentencing practice at issue with “evolving standards of decency.”¹²¹

Similarly, in tallying the prevalence and significance of *Witherspoon* disqualifications when precise figures are available, courts should consider both (1) the *absolute number* and/or *percentage* of *Witherspoon*-excluded venire members and (2) the *trend* in the rate of disqualification over time. These numbers should serve as a counter to the absolute number of jury verdicts of death. Thus, for example, Justice Breyer, dissenting in *Glossip*, argued that the death penalty had become unusual, due in part to the fifteen-year decline in death sentences from an average of 286 per year between 1986 and 1999 to a total of seventy-three in 2014.¹²² Even this description of the sharp decline in death verdicts may vastly overrepresent community willingness to impose the penalty of death. A more accurate gauge of the death penalty’s unusualness would be to put this number side by side with data about the percentage of jurors struck for cause and the rate of change in *Witherspoon* strikes. The side-by-side data could be aggregate—that is, a total number or percentage of death verdicts alongside a total percentage of jurors struck in all capital cases or in those capital cases resulting in a death verdict. Or the side-by-side data could, more meaningfully, though more labor-intensively, be tailored to individual cases. In those seventy-three death verdicts, either as a whole or individually, how many potential jurors were struck for cause? How much smaller might the tally of death verdicts be if there were no conscience-based restrictions on capital jury service? In assessing the practical impact of death qualification, it is necessary to realize that if any single true conscientious objector had made it onto the jury, because of the unanimity requirement, the end result would be a life verdict. A relatively low rate of *Witherspoon* exclusions could thus still have a profound impact on the outcomes of capital trials nationwide.

When precise figures on *Witherspoon* rates are unavailable, the phenomenon of death qualification should serve as a kind of asterisk to the tally of death verdicts—an important caveat to its representativeness of community values.

There are, of course, a few notes of caution in incorporating *Witherspoon* strike rates into the “evolving standards of decency” inquiry. It is worth reiterating that the

121. *Coker*, 433 U.S. at 597 (plurality opinion) (“[I]n the vast majority of cases, at least 9 out of 10, juries have not imposed the death sentence [for the crime of rape].”); *Gregg v. Georgia*, 428 U.S. 153, 182 (1976) (plurality opinion) (“[T]he actions of juries in many States since *Furman* are fully compatible with the legislative judgments, reflected in the new statutes, as to the continued utility and necessity of capital punishment in appropriate cases. At the close of 1974 at least 254 persons had been sentenced to death since *Furman*, and by the end of March 1976, more than 460 persons were subject to death sentences.”).

122. *Glossip v. Gross*, 135 S. Ct. 2726, 2772–73 (2015) (Breyer, J., dissenting) (“An appropriate starting point concerns the trajectory of the number of annual death sentences nationwide, from the 1970’s to present day. In 1977—just after the Supreme Court made clear that, by modifying their legislation, States could reinstate the death penalty—137 people were sentenced to death. Many States having revised their death penalty laws to meet *Furman*’s requirements, the number of death sentences then increased. Between 1986 and 1999, 286 persons on average were sentenced to death each year. But, approximately 15 years ago, the numbers began to decline, and they have declined rapidly ever since. In 1999, 279 persons were sentenced to death. Last year, just 73 persons were sentenced to death.” (citations omitted)).

tally of *Witherspoon* exclusions is not an independently accurate measure of nationwide anti-death-penalty sentiment, and it should not be misused as such. By definition, death-qualification proceedings only occur in those limited jurisdictions in which prosecutors are authorized by law and willing in fact to seek the death penalty, and we certainly may expect that the number of death-penalty opponents in these jurisdictions is substantially lower than the number of death-penalty opponents in other jurisdictions where the death penalty is legally or functionally obsolete.

In fact, one might say that there is an upper limit on the *Witherspoon* strike rate. As more and more people in a particular jurisdiction become *Witherspoon* excludable, at a certain tipping point the elected prosecutor in that jurisdiction will presumably stop seeking death. Thus the rate of *Witherspoon* excludables might actually *decrease* over time even if there is growing opposition to the death penalty, because the death cases become concentrated in the most pro-death jurisdictions.¹²³ Still, even in the most pro-death jurisdictions in the most pro-death states, the state will need to exclude people on the basis of their beliefs in order to secure convictions. And those convictions would otherwise be counted *solely* as indicators that the nation as a whole is not opposed to the death penalty.

The courts should also be aware that the tally of *Witherspoon* strikes does not capture those peremptory challenges of individuals who are not subject to successful for-cause challenges but nevertheless express reservations about the death penalty and thus get removed from juries. This tally also does not include hardship excusals, which remove from capital juries individuals for whom service in a protracted trial, frequently while sequestered, would pose undue difficulties. Hardship excusals may have a disparate racial impact, to the extent that race correlates with factors that boost the likelihood of an excusal, such as household wealth,¹²⁴ single parenthood,¹²⁵ and employment characteristics (such as an hourly-wage employee whose employer refuses to provide paid jury leave). If African Americans are both more death-averse, as suggested by the data collected in the present study, and more likely to be excused for hardship, then hardship excusals may exacerbate the impact of death qualification in producing juries that are more death prone than the communities from which they are drawn.¹²⁶

Even noting these cautionary words, inserting the rate—or even an informed estimate—of *Witherspoon* strikes into the constitutional analysis reincorporates

123. Presumably, however, when this occurs, the number of death verdicts will also decrease.

124. In 2013, the median net worth of white households was thirteen times greater than that of black households. Rakesh Kochhar & Richard Fry, *Wealth Inequality Has Widened Along Racial, Ethnic Lines Since End of Great Recession*, PEW RESEARCH CTR.: FACT TANK (Dec. 12, 2014), <http://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession/> [<https://perma.cc/Q43C-T26R>].

125. According to U.S. Census data, 39.9% of African American parents living with their children under eighteen are single parents, compared to only 12.9% of white parents. U.S. CENSUS BUREAU, TABLE A3. PARENTS WITH CORESIDENT CHILDREN UNDER 18, BY LIVING ARRANGEMENT, SEX, AND SELECTED CHARACTERISTICS: 2015, <http://www.census.gov/hhes/families/files/cps2015/tabA3.xls> [<https://perma.cc/32LW-HDDL>].

126. The impact of hardship excusals on the composition and disposition of capital juries is an area of scholarly inquiry deserving future consideration.

critical dissenting voices into the “evolving standards of decency” inquiry and recovers a more accurate picture of community willingness to sentence individuals to death.

B. Collecting Data

The more data before the Court on *Witherspoon* strike rates nationwide, the more precise its consideration will be of the impact of death qualification in its “evolving standards of decency” inquiry. This Article has taken a first step by explicitly counting every *Witherspoon* strike in eleven recent capital trials.¹²⁷ I hope that this effort of retroactive data collection will continue, either through my own initiative or by others. Yet the labor-intensiveness and methodological limitations of the data collection process constrains its feasibility for active use in litigation and points to the need for a forward-looking, ongoing data-collection process.¹²⁸

In recognition of the practical difficulties of achieving a full accounting of the historical impact of *Witherspoon* strikes, I offer a relatively simple data collection strategy for future trials. I propose that legislatures or courts adopt a forward-looking statute or court rule that would look something like this:

Reporting on death qualification proceedings.

1. *In every capital case,*¹²⁹ *the court reporter shall*
 - (a) *record the number of potential jurors struck for cause on the basis of their opposition to the death penalty;*
 - (b) *record the total number of potential jurors questioned; and*
 - (c) *include these numbers in the transcript of the trial, to be preserved in the record on appeal.*
2. *In every capital case, the trial court shall report the statistics recorded by the court reporter to the state supreme court [or legislature or other centralized body].*

127. Future articles may continue this project of aggregating and analyzing past data on *Witherspoon* strike rates.

128. Capital-jury voir dire transcripts are difficult and often expensive to obtain. They are multiple volumes long and take hours to process. My study of eleven capital trials consumed several hundred hours of data collection, analysis, and processing. Over the same five-year period that I focused on in my study, there were 482 death sentences imposed nationwide. *Death Sentences in the United States from 1977 by State and by Year*, *supra* note 107. Between 2000 and 2014, there were 1879 death sentences imposed. *Death Sentences by Year Since 1976*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/death-sentences-year-1977-2009> [https://perma.cc/8RNN-ER6B]. Massive time, expense, and human effort would be required to fully capture the impact of *Witherspoon* nationwide—although some of this effort could be reduced by taking a national sample of cases resulting in a death verdict, rather than reviewing *every* case resulting in a death verdict.

129. One could imagine a variation on this rule that would require collection of data only in cases where a death verdict was reached, for the reasons articulated *supra* p. 131.

3. *The state supreme court [or legislature or other centralized body] shall maintain and provide meaningful public access to these statistics.*

*The prosecuting attorney and defense attorney shall have the opportunity to review the statistics recorded. If the number is contested by either party, the court shall make a determination of the accurate tally.*¹³⁰

The benefits of such a rule are readily apparent. Most practically, requiring ongoing collection of death-qualification data would have a profound impact on the ability of courts and advocates to account for *Witherspoon* strikes in assessing whether the death penalty offends contemporary standards of decency.

Such a requirement would also have an important effect in affirming the *participatory* ethos of the Eighth Amendment, discussed at greater length below. Rather than silencing the voices of conscientious objectors in the constitutional conversation about permissible punishment, this requirement would affirm the validity and relevance of these voices in the national debate. Imagine the difference between these two conversations between a court and a struck juror:

COURT today: You are struck for cause because you cannot follow the law.

COURT in the future: You are struck for cause because of your strong views against the death penalty. However, your objections have been noted and will be included in the official record of the case.

This court rule would not unduly burden attorneys, judges, or court personnel, nor would it create a substantive change in the law that would spark serious controversy. It would impose a relatively minor contemporaneous-reporting requirement in a context in which court actors are already reviewing the trial record, lodging transcripts, and preparing for appeal.

Inevitably, there will also be some burden placed on the capital-defense community—or perhaps on scholars—to aggregate the data and make it useable and useful to a court. Critically, however, this information would be accessible for common use.

IV. RECLAIMING THE PARTICIPATORY EIGHTH AMENDMENT

As explained above, accounting for the impact of death qualification would further an important practical goal by capturing a more accurate snapshot of society's "evolving standards of decency" on the death penalty. I turn now to consider how this project serves the broader participatory function of the Eighth Amendment itself.

130. The missing piece from the above model rule is one that I find to be of critical importance: a tally of the racial makeup of the group of excluded prospective jurors. I leave this out from the model rule because I anticipate that it would garner significant opposition that may, in some cases, derail the overall project of collecting data on *Witherspoon* strikes. Some jurisdictions refuse to collect data on the racial makeup of jury venires. However, where politically feasible, I would recommend the inclusion of information about the racial composition of the jury venire and the racial composition of those struck under *Witherspoon*.

Eighth Amendment jurisprudence is one of the few significant contexts in which the courts at least profess¹³¹ to engage in a back-and-forth conversation with the populace to determine the scope of constitutional protections. While popular constitutionalists look for and value a dynamic constitutional conversation between the people and the courts to explain the evolution of all areas of constitutional law,¹³² the Eighth Amendment conversation is more direct and deliberate. Silencing voices of death penalty opponents is thus particularly dangerous to the larger Eighth Amendment project.

Because of the focus on “evolving standards of decency,” the Court in the Eighth Amendment context explicitly looks outward to the people to determine the scope of constitutional protections. The voice of the citizenry therefore has a critical role in delimiting the scope of the constitutional guarantee. For instance, after the Court ruled in *Furman v. Georgia*¹³³ that the death penalty was unconstitutional as presently administered, the strong legislative response reenacting reformed death penalty statutes reaffirmed for the Court that there was no consensus that the death penalty was “cruel and unusual.”¹³⁴ And when the Court struck down the practices of

131. Some have argued that the Court’s inquiry into “objective indicia” of “evolving standards of decency” merely provides cover for the Court to reach its own desired conclusion. *See, e.g., Atkins v. Virginia*, 536 U.S. 304, 348 (2002) (Scalia, J., dissenting) (“Beyond the empty talk of a ‘national consensus,’ the Court gives us a brief glimpse of what really underlies today’s decision: pretension to a power confined *neither* by the moral sentiments originally enshrined in the Eighth Amendment (its original meaning) *nor even* by the current moral sentiments of the American people. “[T]he Constitution,” the Court says, “contemplates that in the end *our own judgment* will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.” . . . The arrogance of this assumption of power takes one’s breath away. And it explains, of course, why the Court can be so cavalier about the evidence of consensus. It is just a game, after all.” (emphasis in original) (quoting *Atkins*, 536 U.S. at 312 (majority opinion))); Stinneford, *supra* note 56, at 1757 (“The only real difference between [*Stanford v. Kentucky*, 492 U.S. 361 (1989), and *Roper*] lies not in any ‘evolution’ of societal standards, but in an increased assertiveness of judicial will. The *Roper* majority *wanted* to strike down the death penalty for seventeen-year-olds, despite the fact that the evidence did not demonstrate that such executions violated any societal moral consensus, at least within the United States, and so it simply pretended that the evidence supported the desired result.” (emphasis in original)). Corinna Barrett Lain has argued with nuance that the Court’s death-penalty decisions are constrained not by a majoritarian Eighth Amendment doctrine—which in practice the members of the Court remain free to, and in fact do, sidestep at will—but by the “[n]ondoctrinal majoritarian forces” that operate on the Justices as well as other members of society and influence what outcomes they desire to reach. Corinna Barrett Lain, *Deciding Death*, 57 DUKE L.J. 1, 5–6 (2007).

132. *See, e.g., Robert Post & Reva Siegel, Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 379 (2007).

133. 408 U.S. 238 (1972).

134. *Gregg v. Georgia*, 428 U.S. 153, 179–81 (1976) (plurality opinion) (“Despite the continuing debate, dating back to the 19th century, over the morality and utility of capital punishment, it is now evident that a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction. The most marked indication of society’s endorsement of the death penalty for murder is the legislative response to *Furman*. The legislatures of at least 35 States have enacted new statutes that provide for the death penalty for at least some crimes that result in the death of another person. And the Congress of the United

executing intellectually disabled¹³⁵ and juvenile¹³⁶ offenders, it did so *without overruling* its earlier, opposite conclusions in recent precedent.¹³⁷ Instead, by listening to the voices of the citizenry—by looking outward to indicators of society's views of “cruel and unusual punishments” (as well as inward to their own independent judgment as Justices)—the members of the Court concluded that the ambit of the substantive constitutional protection had changed.¹³⁸ If the national constitutional conversation can alter the shape of constitutional rights under the Eighth Amendment, then it is critical to consider whether and to what extent different members of the polity can participate in that conversation.¹³⁹

States, in 1974, enacted a statute providing the death penalty for aircraft piracy that results in death. . . . [A]ll of the post-*Furman* statutes make clear that capital punishment itself has not been rejected by the elected representatives of the people.” (footnotes omitted)).

135. *Atkins v. Virginia*, 536 U.S. 304, 307 (2002).

136. *Roper v. Simmons*, 543 U.S. 551, 564–65 (2005).

137. *See* *Stanford v. Kentucky*, 492 U.S. 361, 373 (1989) (upholding the execution of juvenile offenders); *Penry v. Lynaugh*, 492 U.S. 302, 335 (1989) (upholding the execution of mentally retarded offenders).

138. *Roper*, 543 U.S. at 563 (“Three Terms ago the subject [of execution of mentally retarded offenders] was reconsidered in *Atkins*. We held that standards of decency have evolved since *Penry* and now demonstrate that the execution of the mentally retarded is cruel and unusual punishment. The Court noted objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions of the mentally retarded. When *Atkins* was decided only a minority of States permitted the practice, and even in those States it was rare. On the basis of these indicia the Court determined that executing mentally retarded offenders ‘has become truly unusual, and it is fair to say that a national consensus has developed against it.’” (citations omitted) (quoting *Atkins*, 536 U.S. at 316)); Stinneford, *supra* note 56, at 1741 (“In *Atkins v. Virginia* and *Roper v. Simmons*, the Supreme Court appeared to agree that the imposition of the death penalty on the mentally retarded and on seventeen-year-olds respectively was *not* cruel and unusual punishment in 1989, when *Penry v. Lynaugh* and *Stanford v. Kentucky* were decided. Nonetheless, the Court held that such punishments *are* cruel and unusual today. As Justice Scalia stated in his *Roper* dissent, the decisions in *Atkins* and *Roper* are based on the proposition ‘that the meaning of our Constitution has changed over the past 15 years—not, mind you, that this Court’s decision 15 years ago was *wrong*, but that the Constitution *has changed*.’” (emphasis in original) (footnote omitted) (quoting *Roper*, 543 U.S. at 608 (Scalia, J., dissenting))); *see also* Aliza Cover, *Cruel and Invisible Punishment: Redeeming the Counter-Majoritarian Eighth Amendment*, 79 BROOK. L. REV. 1141, 1174 (2014).

139. In this paper, I focus solely on the participatory dynamics of Eighth Amendment jurisprudence. In future works, it would be worthwhile to explore the participatory dynamics of other constitutional provisions, as well. In particular, there are a number of constitutional protections whose scope is determined on the basis of community or contemporary values. To name a few: First Amendment jurisprudence incorporates community standards for determining obscenity, *see, e.g.*, *Miller v. California*, 413 U.S. 15, 24 (1973) (considering “whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest” (quoting *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972) (per curiam))); Fourth Amendment jurisprudence seeks to articulate “reasonable” expectations of privacy in a changing world, *see, e.g.*, *Katz v. United States*, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring); and Fourteenth Amendment substantive-due-process analysis looks outward to evolving cultural norms in identifying protected liberties, *see, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 571–72 (2003) (“[W]e think that our laws and traditions in

The Court's inclusion of jury verdicts in the Eighth Amendment analysis incorporates the voices of *individual citizens*—not only the People's representatives—on the cruelty of punishment.¹⁴⁰ Twelve citizens whose primary role is to make a decision about life or death for a particular criminal defendant are also participating in the constitutional conversation about the permissibility of the death penalty. They “speak” through their verdicts about the constitutionality of imposing the punishment of death, and the Court listens.

But capital jurors—both those selected for service and those excused—speak in other meaningful ways besides through their votes in the jury room. In particular, *Witherspoon* proceedings dramatically invite a constitutional conversation. Death qualification occurs at the intersection of two inherently dialogic phenomena: (a) the Eighth Amendment inquiry into “evolving standards of decency” described above and (b) jury voir dire proceedings (and, even more specifically, capital jury voir dire proceedings). Because both the prosecution and defense are motivated to elicit jurors' moral viewpoints on the death penalty, *Witherspoon* proceedings become formal, in-court conversations about the community's “evolving standards of decency.” Death qualification is thus a unique and powerful moment of dramatized dialogue between judges, prosecutors, defense attorneys, and jurors about whether the death penalty is an acceptable punishment, either in particular contexts or as a general matter. Ordinary citizens—some of whom have never had occasion to confront the issue before—are asked to voice their opinions in a court of law about the morality of capital punishment. Setting aside for a moment the debate about the relative merits or injustice of death qualification for individual capital defendants, this is a

the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. “[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.” (quoting *City of Sacramento v. Lewis*, 523 U.S. 833, 857 (1997) (Kennedy, J., concurring)); *id.* at 578–79 (“[T]hose who drew and ratified the Due Process Clauses . . . knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”). What rights do citizens have to participate in the national conversations that determine the scope of these rights?

Often judges debate whether the courts are accurately deciphering community values—or whether they ever can or should, in light of institutional incompetence relative to legislatures. *See, e.g.,* *Glossip v. Gross*, 135 S. Ct. 2726, 2749–50 (2015) (Scalia, J., concurring) (“Capital punishment presents moral questions that philosophers, theologians, and statesmen have grappled with for millennia. The Framers of our Constitution disagreed bitterly on the matter. For that reason, they handled it the same way they handled many other controversial issues: they left it to the People to decide. By arrogating to himself the power to overturn that decision, Justice BREYER does not just reject the death penalty, he rejects the Enlightenment.”). But there is less focus on the systemic legal features that enhance or restrict individual participation in those determinations, if judges are to engage in them. Too often the Court accepts at face value the participatory bona fides of the official institutions to which they turn.

140. Note that the two key objective indicators—capital jury verdicts and legislative determinations—incorporate both the People, directly, and their representatives into the Eighth Amendment analysis.

remarkable opportunity for genuine citizen engagement on the question of “evolving standards of decency.”¹⁴¹

In transcripts reviewed for the Louisiana study, objections voiced to the death penalty ranged from the immorality of state killing to its lack of deterrent value. Consider the following statements made by prospective jurors in Louisiana. When asked about his feeling about the death penalty, one juror responded,

For all intents and purposes, it's not so much a moral objection to it. It's a philosophical one. I believe that the spirit of the law initially is not so much a punishment for crime but to deter crime, and I don't think that that penalty is successful, and that, and therefore, un-Constitutional [sic], really.¹⁴²

Another responded, “[I]t's wrong for any human activity to deliberately foreshorten another's life. Just as murder is wrong I feel the death penalty is wrong. I couldn't be open to imposing the death penalty.”¹⁴³

I must pause here a moment to reemphasize that I am not arguing that death-qualification proceedings present an accurate or complete picture of the American moral or constitutional perspective on the death penalty. At a most basic level, death-qualification proceedings are unrepresentative because they only take place in the states—and in the particular counties or cities within those states¹⁴⁴—that support the death penalty in any form at all and, moreover, that are willing to expend scarce law enforcement and prosecutorial resources to pursue it. Additionally, the content of death-qualification proceedings will often be affected by the quality of the lawyers and judges asking questions, and the “results” of those proceedings may not accurately reflect the full range of community sentiment even in that geographical location. Moreover, the jury venires themselves are frequently unrepresentative of the local population, often underinclusive of poor and minority residents.¹⁴⁵ Other

141. Jury selection, even outside the capital context, is a unique opportunity for meaningful dialogue among citizens. Visit any courtroom during voir dire in a simple drug possession case, and you will hear conversations about topics such as the utility and fairness of the war on drugs, the proper relationship between mental illness and criminal culpability, the trustworthiness of law enforcement, and the overall legitimacy of the criminal-justice system. Generally, these conversations have little impact upon the Court's Eighth Amendment jurisprudence because of the vast deference paid to legislative determinations of permissible punishment outside the capital context. *See, e.g.,* *Ewing v. California*, 538 U.S. 11, 20–28 (2003) (plurality opinion) (summarizing jurisprudence on proportionality in noncapital cases, emphasizing legislative primacy, and applying heavy deference to state legislature in upholding constitutionality of California's three-strikes law); Cover, *supra* note 138, at 1166–71.

142. Transcript of March 16, 2011 at 270, *State v. Doyle*, 56 So. 3d 948 (La. 2011) (No. 15-KA-1592).

143. Transcript of July 26, 2011 at 243, *State v. Mickelson*, 149 So. 3d 178 (La. 2014) (No. 12-KA-2539).

144. *See* Smith, *supra* note 63 (noting the clustering of death verdicts in a small minority of counties nationwide).

145. Jury rolls track voter-registration rolls and thus inherit inequalities from the voting context, including felon disenfranchisement, residency requirements, and outdated jury lists.

dialogues and measurements outside the court system, such as opinion polls, may more accurately and inclusively gauge national sentiment.¹⁴⁶

Nonetheless, the distinctive character of the conversation during death-qualification proceedings warrants consideration. Capital-jury voir dire bears a special gravitas—the gravitas borne of participation in actual court proceedings in which there is a genuine possibility of becoming a decision maker who might be asked to choose between life and death. Consider the following statement by a prospective juror in Eric Mickelson’s Louisiana trial, upon being asked whether, “under any circumstance [he] could . . . ever impose the death penalty”:

Prior to today as an intellectual exercise I would have said that there are cases where it’s appropriate, but to be honest this is the first time I have been confronted with the question where it is not an intellectual exercise, and I don’t have a ready answer for you. I would have to think about it.¹⁴⁷

When asked whether he would be able to consider imposing death if the elements of first-degree murder at issue in this case were proven, this same potential juror responded,

With no more facts than that I would say that I would be able to consider it, but again I’m finding that I’m confronting reality here, and this is literally life and death and that conceptual description that you have given is not enough there for me to answer, there is not enough there for me to answer.¹⁴⁸

As these statements illustrate, while there are significant problems with the use of capital-jury-selection proceedings as accurate reflections of community sentiment, there is also something raw about these proceedings that heightens their salience. For those asking and those answering, the cruelty and permissibility of the death penalty is not an abstract question but one with real-world consequences. I do not mean to overstate capital jurors’ tendency or capacity to internalize the power and responsibility they hold over the fate of a human life. Indeed, both social science literature¹⁴⁹ and legal scholarship¹⁵⁰ have compellingly explored the mechanisms of law that detach legal actors (including jurors) from the law’s violence—allowing them to do, under color of law, things that they could never conceive of doing in ordinary life, and absolving them of an inner sense of responsibility for taking actions that have brutal effects. Even so, the courtroom setting provides a space for a

146. The question of whether opinion polls should *also* be formally incorporated as “objective indicia” of “evolving standards of decency” is a subject for another paper—and one that has already received consideration from legal scholars and social scientists. *See, e.g.*, Niven et al., *supra* note 14, at 88–89.

147. Transcript of July 26, 2011, *supra* note 143, at 245–46.

148. *Id.* at 256.

149. *E.g.*, Bowers & Foglia, *supra* note 30, at 74–75 (explaining findings, based on capital juror interviews, of jurors’ “failure to appreciate their responsibility for the defendant’s punishment”).

150. *E.g.*, Robert M. Cover, Essay, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

performative constitutional dialogue that is more solemn, and more deliberative, than ordinary conversation.¹⁵¹

Yet even as the process of death qualification is thus inherently *dialogic*, under the Court's current approach, the overall impact of death qualification is to serve a *silencing function* in the Eighth Amendment conversation. Perversely, the Court ignores these inherently conversational death-qualification proceedings in determining national opinion about the death penalty. Rather than heeding the voices of death penalty dissenters in gauging opposition to the death penalty, the courts repress the participatory nature of death qualification. Those who give the "wrong" answer are silenced—not only stricken from participation in the individual case, but, unthinkingly, from participation in the national constitutional conversation, as well.¹⁵²

By taking a new approach and accounting for *Witherspoon*-excluded jurors in the Eighth Amendment inquiry into "evolving standards of decency," the courts would be able to distinguish between and ultimately serve two distinct interests: (1) ensuring that jurors follow the law that the legislatures have established, and (2) capturing a more inclusive indicator of community sentiment about the death penalty for the purposes of the Eighth Amendment.

At present, the first interest eclipses the second. The Court has permitted death qualification because, in the Court's view, individuals who are unwilling to substantially consider imposing the death penalty in a particular case are unable to apply the law as written.¹⁵³ This is a *case-specific* justification for the process of death

151. It seems that even Supreme Court Justices such as Chief Justice Rehnquist and Justice Scalia, who have opposed the use of social science data and opinion polls in the "evolving standards of decency" inquiry, would respond more positively to a consideration of death-qualification proceedings under the Eighth Amendment. Chief Justice Rehnquist, for instance, expressed a distrust of data obtained from "individuals randomly selected from some segment of the population, but who were not actual jurors sworn under oath to apply the law to the facts of an actual case involving the fate of an actual capital defendant." *Lockhart v. McCree*, 476 U.S. 162, 171 (1986). Prospective jurors during death qualification—while not sworn to actual jury service in a particular case—nonetheless voice their opinions in a solemn setting in which they swear to tell the truth.

152. An analogy may be drawn here to the related question of whether to count abolitionist states when tallying legislative determinations or trends as objective indicia of "evolving standards of decency." Do nondeath states count when determining the prevalence of a particular practice within the capital punishment system? Recent Supreme Court decisions have clarified that the answer is yes; if we only considered the choices of death penalty states, we would be silencing the nondeath states in the constitutional conversation. *See Hall v. Florida*, 134 S. Ct. 1986, 1997 (2014) ("On the other side of the ledger stand the 18 States that have abolished the death penalty, either in full or for new offenses, and Oregon, which has suspended the death penalty and executed only two individuals in the past 40 years."); *Roper v. Simmons*, 543 U.S. 551, 574 (2005) ("[T]he . . . Court should have considered those States that had abandoned the death penalty altogether as part of the consensus against the juvenile death penalty."). It should be noted that Justice Alito and three other Justices disagreed with tallying of nondeath states, at least in light of the specific evidentiary question posed by that case. *Hall*, 134 S. Ct. at 2004–05 (Alito, J., dissenting).

153. *E.g.*, *Adams v. Texas*, 448 U.S. 38, 45 (1980) ("[A] juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions

qualification, focused on the state's interest in prosecuting an individual defendant. Whether or not we agree with this logic,¹⁵⁴ it is clearly related to the juror's ability to make an individualized determination of guilt and punishment in a particular case within the confines of the law as it exists. This justification has no bearing on the individual's capacity to participate in a national conversation about the permissibility of the death penalty.

However, the dual use of jury verdicts as "objective indicia" of "evolving standards of decency" grafts this *case-specific* logic onto the *constitutional* inquiry. It removes the most impassioned critics of the decency of the law before measuring whether the community believes the law to abide with evolving standards of decency. There is no constitutional basis for their removal from the broader conversation.

To realize a more participatory Eighth Amendment, we must invite these critics back into the constitutional conversation by explicitly *accounting for them* in the "evolving standards of decency" calculus—even if we do nothing to change the practice of striking jurors for cause in individual cases. We need to separate out the permissibility of their participation in individual juries from the permissibility of their participation in the constitutional dialogue on "evolving standards of decency."

CONCLUSION

The Court's failure to consider death-qualification rates alongside the rate of death verdicts in its "evolving standards of decency" analysis leads to a fundamentally flawed estimation of societal values. Death qualification, a practice long justified on the basis of ensuring an "impartial jury" for the state in individual cases, has a biasing effect upon the larger constitutional project of determining whether capital punishment constitutes "cruel and unusual punishment." The failure to incorporate *Witherspoon* strike rates into the Eighth Amendment inquiry skews the results of that inquiry and diminishes the participatory values behind it.

This Article presents the results of an initial study into the prevalence of *Witherspoon* strikes today. It reports that, across eleven capital trials resulting in death verdicts in Louisiana in which 1445 prospective jurors were questioned about their views on the death penalty, an average of 22.2% of the venire was struck for cause on the basis of opposition to the death penalty. These *Witherspoon* exclusions, moreover, had a disproportionate impact upon African American jurors, eliminating 36.2% of all African American venire members on this basis. These findings make a strong case for the empirical significance of death qualification upon the outcome of capital trials and, ultimately, upon the Court's assessment of the continued constitutionality of the death penalty. The time has come to systematically and prospectively collect data about *Witherspoon* strikes and to meaningfully incorporate the voices of death penalty dissenters into the determination of the death penalty's constitutionality.

and his oath. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court.").

154. And there is good reason to disagree. See Cohen & Smith, *supra* note 69, at 117–21 (describing the traditional function of the jury to decide questions of law in individual cases).